SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 223

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND SWIFT & COMPANY, APPELLANTS

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

INDEX

1 [Caption omitted.]

In District Court of the United States, Northern District of Ohio, Eastern Division

Civil No. 24435

[File endorsement omitted.]

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, THE ERIE RAILROAD COMPANY, THE WHEELING AND LAKE ERIE RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY, PLAINTIFFS

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Motion for preliminary injunction

Filed Nov. 20, 1946

The plaintiffs herein move the Court for preliminary injunction enjoining the defendants, their employees and attorneys, and all persons in active concert and participation with them, pending the final hearing and determination of this action, from putting into effect and enforcing the order of the Interstate Commerce Commission in Docket No. 28714 entitled Swift & Company v. Baltimore and Ohio Railroad Company, et al., on the grounds that

(1) Unless restrained by this Court defendants will perform the acts referred to;

(2) Such action by the defendants will result in irreparable injury, loss and damage to the plaintiffs, as more particularly appears in the verified complaint and the affidavit of Robert R. Pierce, attached hereto;

3 (3) The issuance of a preliminary injunction herein will not cause undue inconvenience or loss to defendants but will prevent irreparable injury to plaintiffs.

The Baltimore & Ohio Railroad Company, Baker, Hostetler and Patterson, by (Sgd.) Dwight B. Buss, Its Attorneys, 1956 Union Commerce Building, Cleveland, Ohio; The Pennsylvania Railroad Company, Squire, Sanders and Dempsey, by (Sgd.) Geo. H. P. Lacey, Its Attorneys, 1857 Union Commerce Building, Cleveland, Ohio; The Erie Railroad Company, by (Sgd.) Willis T. Pierson, General Counsel, Midland Building, Cleveland, Ohio; The Wheeling & Lake Erie Railway Company,

M. B. and H. H. Johnson, by (Sgd.) John A. Duncan, Its Attorneys, 1669 Union Commerce Building, Cleveland 14, Ohio; The New York Central Railroad Company, by (Sgd.) Robert R. Pierce, Chief Assistant General Attorney, 1324 West Third Street, Cleveland 13, Ohio.

4 *Affidavit in support of motion for preliminary injunction*

STATE OF OHIO,
Suyahoga County, ss:

Robert R. Pierce, being duly sworn, says that:

(1) He is one of the attorneys for the plaintiffs in the above-entitled action and was one of the attorneys for the plaintiffs herein who were respondents in the action styled Swift and Company vs. The Baltimore and Ohio Railroad Company, et al., before the Interstate Commerce Commission under Docket No. 28714;

(2) He has personal knowledge of all of the facts hereinafter stated;

(3) The New York Central operates main lines of railroad in Cleveland in the vicinity of West 65th Street. The Cleveland Union Stock Yards Company has and operates a stock yards located southerly of the New York Central's main tracks. The Stock Yards has a sidetrack which connects with the New York Central main track lead, and this Stock Yards track extends southerly along the west side of West 65th Street. Swift and Company has and operates a meat processing plant which is located generally easterly of the Stock Yards. Swift and Company has a sidetrack which does not connect directly with the New York Central main line railroad. In order that the New York Central for itself and the other plaintiffs and Cleveland railroads may make deliveries of livestock to the Swift and Company sidetrack, the cars must first be moved over the sidetrack of the Stock Yards before reaching the Swift and Company's private sidetrack. The Stock Yards Company has refused, and continues to refuse, to permit movements over its sidetrack between the New York Central
5 main line and Swift and Company's sidetrack, without compensation, either from Swift and Company or from the New York Central and other Cleveland railroads, substantially equal to the yardage charges which would be payable to the Stock Yards if Swift and Company accepted deliveries of livestock at the unloading chutes and pens in the Stock Yards. Swift and Company has refused to pay the Stock Yards Company for permission to use its private sidetrack and has demanded that the

railroads make deliveries to its plant and absorb the charge for the use of the Stock Yards track in its line haul rates.

The order of the Commission directs the plaintiffs and the Nickel Plate to abstain from refusing to make livestock deliveries to Swift and Company's plant and to establish and put in force by November 30, on five days' notice, a tariff providing for delivery of livestock to Swift and Company's plant.

(4) Unless defendants are enjoined and restrained during the pendency of this action from the enforcement of the order of the Interstate Commerce Commission above referred to, the plaintiffs will suffer great and irreparable damages in the following respects:

(a) The compliance by the plaintiffs with said order of the Commission would require The New York Central Railroad Company to commit acts of trespass upon the property of The Cleveland Union Stock Yards Company, thereby subjecting it to suits for damages or actions to restrain it from continuing such trespasses.

(b) Should the plaintiffs fail, neglect, or refuse to comply with the order of the Commission they, their officers, agents, and representatives would be subject to severe and irrecoverable penalties under the provisions of Section 16 (8) of the Interstate Commerce Act, 49 U. S. C. Anno. 16 (8).

6 (c) Should the plaintiffs commerce making deliveries of livestock to Swift and Company in compliance with the order of the Commission and then be restrained by court of competent jurisdiction from continuing to make such deliveries, the result would be endless confusion in the transportation of interstate shipments of livestock to the Swift and Company at Cleveland.

(d) Should the plaintiffs, in order to comply with the order of the Commission without interference by the Stock Yards Company, choose to pay and absorb in their line haul rates the charges which would be exacted by the Stock Yards Company, it would be guilty of giving an unlawful preference or rebate to Swift and Company.

(e) Compliance by the plaintiffs with the order of the Commission to make deliveries to Swift and Company over the tracks of the Stock Yards Company, without permission of the Stock Yards Company, would constitute an unlawful deprivation of Stock Yards property without due process of law.

(f) The effect of the order of the Commission is that the handling of livestock over the tracks of Stock Yards Company would be to extend the railroad of the New York Central, contrary to Sections 1 (18) to 1 (22), without the railroad previously having

filed any application for such extension. Hence, compliance with the order would amount to extension of the New York Central Railroad without proper authority.

Further affiant saith not.

(Sgd.) ROBERT R. PIERCE.

Sworn to before me and subscribed in my presence this 20th day of November A. D. 1946.

L. N. SHANER,
Notary Public,
Notary Public, Cuyahoga County, Ohio.

My commission expires June 6, 1949.

7 In United States District Court

Civil No. 24435

[Title omitted.]

Complaint

Filed Nov. 20, 1946

I

(a) The plaintiffs bring this action under the Act of Congress approved October 22, 1913, and known as the District Court Jurisdiction Act, 38 Stat. 219, U. S. C. Title 28, Secs. 41 (27) to 48, to enjoin, set aside and annul a certain order made and entered by the Interstate Commerce Commission and dated May 3, 1946, in a proceeding before it, styled No. 28714, Swift and Company vs. The Baltimore and Ohio Railroad Company, et al., the Commission's report in said proceeding being entitled Swift and Company vs. Baltimore and Ohio Railroad Company, et al., 266 I. C. C. 55; and also to enjoin the enforcement of said order. The plaintiffs herein are The Baltimore and Ohio Railroad Company, The Pennsylvania Railroad Company, The Erie Railroad Company, The Wheeling and Lake Erie Railroad Company, and The New York Central Railroad Company.

(b) A copy of said order, to become effective August 30, 1946, and of the report of said Commission, which is referred to in and made a part of said order, are appended hereto, marked Exhibit A. The details of the unlawful effect which this

8 Report and Order will have upon the plaintiffs herein are set forth in Section VII and VIII of this complaint.

(c) Under date of July 25, 1946, said Commission issued its further order in said No. 28714, providing that the effective date of its order of May 3, 1946, therein be modified to become effective

October 30, 1946; and under date of October 17, 1946, said Commission issued its order in said No. 28714, further modify its previous order to become effective November 30, 1946, and certain schedules or tariffs were ordered to be published on fifteen days' notice; and on November 13 said order was modified to become effective November 30, 1946, on five days' notice; copies of said further orders are appended hereto, marked Exhibits B–1, B–2, and B–3.

II.

Plaintiffs herein are common carrier railroad corporations engaged in the transportation of passengers and property in interstate commerce, and subject to the Interstate Commerce Act and to the Acts amendatory thereof and supplemental thereto; each plaintiff is organized, or authorized, under the laws of the State of Ohio to do business in the State of Ohio, and one or more of said plaintiffs have a residence or a principal operating office in Cleveland, Ohio.

III

The United States of America is made a defendant in this suit under the authority of said District Court Jurisdiction Act, 38 Stat. 219, and 36 Stat. 1149.

IV

The Interstate Commerce Commission is an administrative tribunal, created by the Act to Regulate Commerce approved February 4, 1887, 24 Stat. 383, and amendments thereto, now known as the Interstate Commerce Act, with specifically vested powers and duties respecting interstate commerce under said Interstate Commerce Act and the various acts amendatory thereof and supplemental thereto.

9 V

Position of Swift and Company in its complaint filed with the Interstate Commerce Commission:

On or about September 3, 1941, Swift and Company, which is organized under the laws of the State of Illinois, with principal office and place of business in Chicago, Illinois, engaged in the packing house business and operating a packing plant at Cleveland, Ohio, filed with the Interstate Commerce Commission a complaint against the plaintiffs herein, The New York, Chicago and St. Louis Railroad Company (hereinafter referred to as "Nickel Plate"), The Cleveland Union Stockyards Company and The Livestock Terminal Service Company, and said complaint was docketed

as No. 23714; in said complaint it was alleged that the complainant maintains in Cleveland a plant for the processing of livestock, located approximately between West 63rd Street and West 65th Street and directly across West 65th Street from said The Cleveland Union Stockyards Company, which said plant is equipped with certain railroad sidetrack facilities connected with the lines or tracks of the plaintiffs herein; that adjacent thereto complainant maintains livestock pens upon its property at which livestock can be received and unloaded from railroad cars and held awaiting slaughter; that prior to November 12, 1938, the plaintiff herein and the Nickel Plate delivered carload shipments of livestock upon said railroad siding adjacent to complainant's said plant at Cleveland, Ohio, the total rate and charge for such delivery being included in the line haul rates of said plaintiffs herein and the Nickel Plate on livestock from the points of origin to Cleveland, Ohio; that C. C. C. and St. L. tariff I. C. C. No. 8785, and prior issues thereof, showed complainant's plant at Cleveland, Ohio, as an industry on that railroad at Cleveland, Ohio, for the purpose of receiving and shipping all classes of freight; that said tariff published a charge of $3.47 per car for switching carload shipments of livestock from the lines of the other railroads in Cleveland, Ohio, to said plant of complainant; that the tariffs of said plaintiffs herein and the Nickel Plate provided for the absorption of said switching charge so that livestock was delivered to said plant of complainant without any charge over and above the line haul rates upon livestock in carloads from the various points of origin to Cleveland, Ohio; that effective November 12, 1938, in supplement 44 to C. C. C. and St. L. tariff No. 8785, the application of the switching charge of $3.47 was restricted so as not to apply on livestock; that said restriction left the railroads (other than The New York Central Railroad Company) without any rates applicable in connection with the delivery of interstate shipments of livestock to complainant's plant at Cleveland, Ohio, and that since November 12, 1938, as a result of the restriction of said switching charge, the plaintiffs herein and the Nickel Plate have failed and refused, over the protest of complainant, to deliver livestock in carloads upon the railroad siding and to the facilities adjacent to complainant's plant at Cleveland, Ohio.

The complainant further alleged that said The Cleveland Union Stockyards Company, was and is the owner of a certain railroad track or tracks over which plaintiffs herein and the Nickel Plate necessarily moved their cars in making delivery to complainant's plant at Cleveland, Ohio; that said The Cleveland Union Stockyards Company notified plaintiffs herein and the Nickel Plate that it would no longer permit the use of said railroad track or tracks

by plaintiffs herein and the Nickel Plate in connection with delivery of carload shipments of livestock to complainant's plant at Cleveland, Ohio; that, as a result of this notice by said The Cleveland Union Stockyards Company, to plaintiffs herein and the Nickel Plate, the plaintiffs herein and the Nickel Plate refused and still refuse to deliver carload shipments of livestock to the sidetrack adjoining complainant's plant at Cleveland, Ohio; that, as a result of said refusal by plaintiffs herein and the Nickel Plate,

11 direct shipments of livestock to complainant intended for its Cleveland plant are denied delivery except through the public stockyards and other facilities of said The Cleveland Union Stockyards Company; and that complainant has been deprived of the delivery of livestock cars at its own railroad sidetrack facilities adjacent to its plant.

It is further alleged in said complaint that plaintiffs herein and the Nickel Plate deliver to and receive from complainant's plant in Cleveland all classes of freight, other than livestock, in carloads; that other companies engaged in processing meat products, located in the same vicinity and in active competition with complainant, receive deliveries of interstate shipments of livestock direct to their railroad sidings, that under a new tariff of The Livestock Terminal Service Company, effective August 10, 1944 (said The Livestock Terminal Service Company was dissolved shortly after October 1, 1944, and was the company which performed the services of loading and unloading carload shipments of livestock at the public stockyards facilities of The Cleveland Union Stock Yards from June 1, 1940, to September 30, 1944, which was a portion of the period during ... ch a controversy existed between the Stock Yards, Cleveland railroads and Swift and Company with respect to what constituted a reasonable charge for performing certain services in connection with loading and unloading livestock), there is no provision for the absorption of any unloading charge of said named Service Company, and makes an allowance of only 90 cents per car for unloading cars of livestock at the facilities of said The Cleveland Union Stockyards Company; that such provisions of the tariff require complainant to pay charges in excess of those previously paid on line haul rates of railroad defendants therein upon livestock to Cleveland "due solely to the failure and refusal of the railroad defendants therein to deliver livestock to the sidetrack facilities at complainant's plant at Cleveland, Ohio."

Complainant further alleged that (a) the current charges are unreasonable in violation of Section 1 (5) of the

12 Interstate Commerce Act; (b) it is deprived of lawful transportation to which it is entitled in violation of Section 1 (3) of said Act; (c) railroad defendants therein have

abandoned the operation of a portion of their line of railroad necessary to the delivery of carload shipments of livestock at complainant's plant in Cleveland without prior authority therefor, in violation of Sections 1 (18), (19) and (20) of said Act; (d) it is subjected to unjust discrimination in violation of Section 2 of said Act; and (e) undue and unreasonable preference and advantage have been given to its competitors, in violation of Section 3 (1) of said Act.

VI

The position of the plaintiffs herein in this matter is as follows:

(1) Carload shipments of various commodities consigned to and shipped from Swift & Company's plant in Cleveland, Ohio, are transported over certain yard tracks, among which is a track known as No. 245, which is shown in colors and designated upon a blueprint, marked Exhibit C, which is attached hereto.

At a point within the boundaries of West 65th Street in the City of Cleveland, said Track No. 245, at its northerly end, is connected with and diverges from the main tracks of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (known as the "Big Four"), the railroads and properties of which company is now, and has been since 1930, leased to and operated by The New York Central Railroad Company, one of the plaintiffs herein, which said plaintiff company will be referred to hereinafter as the New York Central; beginning at the point of connection with the New York Central main tracks described hereinabove, said Track No. 245 extends toward the south for approximately 2,544 feet along a general northerly and southerly line, is located westerly of and in close proximity to the westerly side of West 65th Street, in the City of Cleveland, Cuyahoga County, Ohio,

13 (2) The initial or northerly 1:2 feet of said track is owned by and located upon the right of way of the New York Central; the next 1,619 feet of said track extending toward the south is owned and controlled by and located upon property owned and controlled by The Cleveland Union Stockyards Company, hereinafter referred to as the Stock Yards (the southerly 190 feet of this 1,619 feet of said Track No. 245 owned by the Stock Yards is located on property over which an easement was reserved by the Stock Yards when that portion of the land occupied by this track was conveyed to Standard Beef Company and Kreinberg and Krasny), and the southerly 793 feet portion of said Track No. 245 is owned by one of the plaintiffs, the New York Central, and is located upon lands which are owned by the Stock Yards or were reserved for sidetrack purposes by the Stock Yards when certain parcels of land were sold by the Stock Yards. Most of this 793 feet of track was constructed at the request of,

and pursuant to arrangements made by Swift & Co. in 1910 in order to enable Swift & Co. to get a track to its plant on West 63rd Street which would be reached and served by traversing the aforementioned 1,619 feet of track owned by the Stock Yards.

At the request of Swift and Company, a switch track known as No. 240, which diverges from said track No. 245 at a point about 82 feet south of the south end of the 1,619 feet of track owned by the Stock Yards, was built in 1910 and extended in an easterly direction across West 65th Street in order to connect with a private sidetrack which Swift & Co. was having constructed to its plant located parallel to and immediately west of the westerly side of West 63rd Street; this switch track was constructed across West 65th Street under a permit granted to the Big Four in accordance with arrangements made by Swift and Company with the City of Cleveland, and said track was extended easterly of West 65th Street on land procured by Swift & Company
14 and easements procured by Swift & Company for right of way purposes were furnished to the New York Central in order to complete the construction of this switch track to serve the private sidetracks at Swift and Company's plant, which said private sidetracks serving Swift and Company's plant are owned by Swift and Company.

(3) The Commission's record is replete with evidence showing that Swift and Company, the complainant, with full knowledge that the 1,619 feet of track was owned by the Stock Yards, and after full consideration and long deliberation chose to, and did, provide the right of way and obtain an ordinance permit to cross West 65th Street so as to enable Swift and Company to procure an indirect track connection with the New York Central main tracks by using the 1,619 feet of track owned by the Stock Yards, with all of the attendant uncertainties (of which the present development is one), rather than to provide its own right of way at the northerly end of West 63rd Street.

This route from New York Central's tracks and right of way at the northerly end of West 63rd Street for a direct track connection to Swift and Company's plant was feasible and available and Swift and Company's plant sidetrack could have been constructed to connect directly with the New York Central tracks at the north end of West 63rd Street and could have been provided at any time by Swift and Company so as to entitle that company to all of the rights which Swift and Company is now demanding and which the Commission has ordered the plaintiffs herein and the Nickel Plate to provide to Swift and Company. However, Swift and Company deemed such direct track connection, which was for many years, and may yet be, available, and which is reasonably practicable and could be constructed with safety in

accordance with Section 1 (9) of the Interstate Commerce Act, to be economically undesirable.

From 1908 to 1930 Swift and Company was content to accept delivery of its carload shipments of livestock through the
15 unloading facilities of the Stock Yards, and to have delivery to and shipment from its plant of other commodities made by traversing the 1,619 feet of track owned by the Stock Yards.

(4) From 1910 until the present time, carload shipments of all classes of commodities, exclusive of livestock, consigned to or shipped from Swift and Company's private sidetrack, were transported over said 1,619 feet of track owned by the Stock Yards and the other tracks described hereinbefore as part of the transportation service included in the line haul rates named in tariffs filed and published by plaintiffs herein. The only period during which carload shipments of livestock were moved over the 1,619 feet of track owned by Stock Yards to Swift and Company's private sidetrack in any appreciable volume was between January 1, 1930, and February 1, 1935. No livestock has been delivered at Swift and Company's plant since 1938.

(5) In connection with transporting said carload shipments of livestock consigned to, and other commodities consigned to and shipped from, Swift and Company's plant, for carriers other than the Big Four, said plaintiff, the New York Central, published and had in effect what is known as its Big Four District switching tariff, in which the names of certain shippers, including Swift and Company, were shown as industries on its railroad, to and from which switching service was provided for at specified switching charges, and the railroad carriers other than New York Central, plaintiffs herein, absorbed the switching charge published in said tariff for switching services performed on the Big Four District of the New York Central in connection with shipments consigned to or from Swift and Company's plant and transported to or from Cleveland over railroads other than the Big Four District of the New York Central.

Effective February 1, 1935, the Stock Yards served notice upon the New York Central of termination of the sidetrack agreement of June 16, 1924, between the Stock Yards and the New York Central, and Section Fourth of that agreement was
16 amended effective February 1, 1935, as outlined more in detail hereinafter, to provide that the free use of the 1,619 feet of track owned by Stock Yards for "competitive traffic" was prohibited, said competitive traffic being construed by the parties to mean "livestock," and that a charge for the use of said 1,619 feet of track for shipments of livestock "shall be" the subject of a separate agreement. The Stock Yards then demanded certain charges on livestock moved over the 1,619 feet of track owned

by it to the plant of Swift and Company and other packers, and at that time in 1935 the plaintiffs herein and the Nickel Plate discontinued making delivery of livestock to Swift and Company's plant or to any packers by using the 1,619 feet of track owned by the Stock Yards. Although various negotiations were conducted looking toward reaching an agreement, no such separate agreement as to a charge for moving livestock over said 1,619 feet of track owned by the Stock Yards was reached, and the switching tariff of the New York Central was amended, effective November 12, 1938, to indicate that Swift and Company's plant was not an industry located on the New York Central for delivery of livestock.

On August 14, 1941, Swift and Company demanded that the plaintiffs herein and the Nickel Plate deliver livestock to its private sidetrack, which would have required resuming the use of said 1,619 feet of track owned by the Stock Yards for that purpose, and on September 27, 1941, plaintiffs herein and the Nickel Plate advised Swift and Company that they could not make delivery of livestock at Swift and Company's plant without traversing a track owned by the Stock Yards; that the plaintiffs herein and the Nickel Plate would be glad to comply with Swift and Company's request

"when, as and if we are advised by you that you have obtained the consent of the owner of this track for the use thereof without obligation to the railroads, for the delivery of livestock shipments to your plant. You will appreciate that until this consent is obtained by you, we will be unable to comply with your request."

17 Swift and Company has since billed its livestock for delivery at its private siding, which instructions plaintiffs herein have ignored, and delivery of livestock has been tendered and accepted by Swift and Company under protest at the unloading pens in the Stock Yards facilities.

(6) Prior to the time that the Big Four railroads and properties were leased to the New York Central, the Big Four had entered into several private sidetrack agreements with the Stock Yards, providing for certain lands owned by the Stock Yards to be used for various tracks owned by the Big Four, and also for the use by the Big Four of the 1,619 feet portion of track No. 245, which is owned by the Stock Yards. The earlier agreements beginning in 1899 set forth that the 1,619 feet of track was constructed on lands owned by the Stock Yards and at the cost of the Stock Yards, and said 1,619 feet of track and the land occupied thereby was owned by the Stock Yards. The Big Four was required to maintain said 1,619 feet of track at the expense of the Stock Yards and the Big Four was given the right to use said 1,619 feet of track in business other than that of the Stock Yards

"provided such use of sidetrack will not interfere with the business of the Second Party (Stock Yards)."

This contract, dated May 10, 1899, contained a 60 days' termination clause.

On June 16, 1924, another private sidetrack agreement was made between the Stock Yards and the Big Four pertaining to the 1,619 feet of track in controversy and other tracks, and in that agreement the ownership by the Stock Yards of said 1,619 feet of track was recognized by the parties thereto, the agreement of May 10, 1899, was cancelled, a thirty-day termination clause was inserted in said new agreement, and paragraph Fourth of said agreement of June 16, 1924, reads as follows:

"Fourth. All of said tracks, irrespective of ownership, shall be maintained by the Railroad without expense to the Indus-
18 try; in consideration for which the Industry shall and by this instrument does grant to the Railroad, (a) the free occupancy of its land by any and all tracks or portions thereof located thereon belonging to the Railroad, and (b) the free and uninterrupted use of any and all tracks or portions thereof belonging to the Industry and located on its land."

Having an important bearing on this subject at this juncture is the fact that from November 2, 1916, to April 28, 1936, at the request of Swift & Co.'s President, Swift & Co.'s Cleveland plant manager served continuously as a Director of the Stock Yards and was a member of the Executive Committee when there was such a committee in existence, and from 1920 to 1924 Swift & Co.'s traffic manager was a member of the Transportation Committee at the Stock Yards; also, during the period from 1916 to 1936 Swift and Company owned about 6% of the stock of the Stock Yards Company. The Supreme Court of the District of Columbia, in Equity Case No. 37623, entitled "United States of America, Petitioner, vs. Swift and Company, et al., Defendants," on January 31, 1931, directed Swift and Company to divest itself of ownership of stock in public stock yards (including The Cleveland Union Stock Yards Company), which was finally accomplished in 1936. After the above-mentioned Court ordered Swift & Co. to divest itself of ownership of stock in public stock yards, the number of shipments of livestock consigned direct to Swift & Co.'s plant sidetrack was increased, whereas theretofore, and since the inception of its operations in Cleveland, such shipments of livestock had been consigned to and unloaded at the unloading chutes and pens of the Stock Yards which are located directly across West 65th Street from Swift & Co.'s plant.

From January 1, 1930, to February 1, 1935, Swift & Co. directed 1,161 carloads of livestock to be delivered at its plant sidetrack, which necessitated moving said shipments over the 1,619 feet of

track owned by the Stock Yards. Such carload shipments of livestock consigned directly to Swift and Company's plant attained such a volume as to effect a reduction in the earnings of the Stock Yards and resulted in the Stock Yards giving notice to the New York Central in January 1935, that the private sidetrack agreement of June 16, 1924, between Stock Yards and the New York Central was thereby terminated on 30 days' notice and a new private sidetrack agreement between Stock Yards and the New York Central, effective February 1, 1935, which contained a 30 days' termination clause, was entered into in which the hereinabove quoted paragraph Fourth was amended to read as follows:

"Fourth. All of said tracks, irrespective of ownership, shall be maintained by the Railroad without expense to the Industry; in consideration for which the Industry shall and by this instrument does grant to the Railroad, (a) the free occupancy of its land by any and all tracks or portions thereof located thereon belonging to the Railroad, and (b) the free and uninterrupted use, except for competitive traffic a charge for which use shall be the subject of a separate agreement, of any and all tracks or portions thereof belonging to the Industry and located on its land."

On May 11, 1943, the Commission made certain findings in 255 ICC 579–598, entitled Baltimore & Ohio RR Co., et al., vs. Cleveland Union Stock Yards Co., with respect to the common carrier obligations in connection with the services and charges connected with loading and unloading livestock. In determining a reasonable charge for services of loading and unloading livestock, the Commission failed to include therein values for lands occupied by certain tracks, whereupon the Stock Yards sought rental for such lands. As a result of negotiations between the New York Central Railroad and Stock Yards at that time, a supplemental agreement to sidetrack agreement dated June 16, 1924, between the New York Central Railroad Company, successor to and lessee of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and The Cleveland Union Stock Yards Company, was entered into and, in part, pertains to the limited use which is permitted of Stock Yards' tracks, including the 1,619 feet of track involved in this controversy. A copy of this agreement, marked Exhibit D, is attached hereto.

(7) No agreement as to a charge for the use of the 1,619 feet of track owned by the Stock Yards Company in order to place carload shipments of livestock at Swift and Company's plant sidetrack was ever reached, although numerous conferences were held. The Stock Yards Company demanded of the plaintiffs herein and the Nickel Plate charges aggregating from $6.00 to $9.00 per car on a per head of livestock basis, which

the plaintiffs herein and the Nickel Plate considered exorbitant for such use of said 1,619 feet of track. Litigation was instituted in Common Pleas Court by the Stock Yards against some of the plaintiffs herein and the Nickel Plate, covering the use of the 1,619 feet of track and other services performed in connection with loading and unloading carload shipments of livestock at the Stock Yards.

When the Stock Yards persisted in restricting the use of its portion of the track with respect to competitive traffic, or livestock, the plaintiffs herein looked to the private sidetrack agreements with the industries served by traversing the 1,619 feet of track owned by Stock Yards, and in a letter dated October 6, 1938, the New York Central notified Swift and Company and the other industries served by traversing the 1,619 feet of track owned by the Stock Yards, that the New York Central was unable to effect satisfactory arrangements with the Stock Yards to make possible the handling of livestock over said 1,619 feet of track, and requested Swift and Company and said other industries to endorse their acceptance of said change in their respective sidetrack agreements, all of which contained 30- or 60-day termination clauses. Three of the industries agreed to this modification, two of the industries did not reply, and Swift and Company acknowledged receipt of the notice from the New York Central, but refused to agree to a change in its private sidetrack agreement, replying that it did not see why the New York Central desired to change the agreement, as the 1,619 feet of track was not being used for
21 the delivery of carload shipments of livestock to Swift and Company's plant.

In private sidetrack agreements between Swift and Company and the New York Central, both parties retained the right to discontinue the use of the track and to require its removal on 60 days' notice. On May 25, 1912, a similar agreement was executed by the said parties as to an extension of Swift and Company's sidetrack. The agreements of October 27, 1910, and May 25, 1912, were superseded by one dated November 25, 1916, providing for a further extension of Swift and Company's plant sidetrack at Swift and Company's expense for construction and maintenance and to be owned by Swift and Company. This agreement also contained a 60 days' termination clause in favor of both parties.

Swift and Company purchased from The Federal Packing Company the latter's plant, September 27, 1930. At that time The Federal Packing Company had a private sidetrack covered by an agreement, dated May 28, 1927, with the Big Four. This private sidetrack agreement was amended November 24, 1930, and was

assigned by The Federal Packing Company to Swift and Company, April 2, 1938, and Swift and Company, as successors, assumed the obligations of this contract. This agreement likewise contained a termination clause requiring the giving of 30 days' notice by either party to that effect. This agreement contained numerous provisions, among which is the following:

"Fourth. The railroad shall have the right to cease, forthwith and without notice, all operations upon said track, if compelled so to do by the owners, other than the respective parties hereto, of any portion of said track, or of the land upon which said track, or any portion thereof, may be laid."

Notwithstanding the termination clauses in all of the private sidetrack agreements with Swift and Company, and the next hereinbefore quoted provision in the sidetrack agreement of May 28, 1927, when requested in a letter, dated October 6, 1938, to en-
22 dorse its acceptance on one copy of that letter of the modification of its sidetrack agreements with respect to relieving the New York Central from handling livestock over said 1,619 feet of track, Swift and Company replied December 2, 1938, as follows:

"Referring to your letters of October 6 and November 22.

We have received a reply from Chicago in which they state they have no objection whatever to acknowledging the two letters which you sent us, but they do think they should have some protection in the way of a written understanding that in the event of a strike, or anything else, that will prevent delivery of livestock through the Cleveland Stock Yards facilities, we can use this track for direct deliveries. We shall be obliged if you will let us have a letter to this effect and we will immediately send it to Chicago and arrange for acknowledgment of your letter of October 6."

On January 6, 1939, the New York Central sent the following letter to Swift and Company:

"Referring to your letter of December 2, 1938, in which you refer to our letters to you of October 6th and November 22nd, respectively, relating to discontinuance of delivery of livestock over track owned by The Cleveland Union Stock Yards Company, and quote the substance of a letter to you from your Chicago office:

You must realize that the New York Central is not discontinuing the service referred to in its letters of October 6th and November 22nd because of a desire on its part to do so, but only because the price demanded by the Stock Yards Company for service over its side track was so high that this Company could not afford to use the track and pay the price demanded.

Under the circumstances, you will also realize that the New York Central could not undertake to insure service over this track in case of a strike at the Stock Yards, unless some arrangements were made with the Stock Yards Company to permit the service upon a fair basis.

It occurs to us that your company might be better able to arrange for service over the Stock Yards track than the New York Central has been able to do."

A letter dated January 30, 1939, from Swift and Company was received, reading as follows:

"We have been somewhat delayed in replying to your letter of January 6, with reference to your suggested change in our present agreement covering the track on the westerly side
23 of West 65th Street and owned by the Cleveland Union Stock Yards Company, as we wished to make a thorough check of the situation. Since doing this, we find no logical reason for changing our agreement.

We find that you are not making any deliveries of livestock over this track and have not been for a good many months. Also, in the event of a strike, fire, or any other condition that should tie up the Stock Yards, we will naturally expect you to make direct deliveries of livestock to our plant over this track, which is the only track available for such purposes, and it is our understanding that you must provide proper delivery facilities for any consignee of livestock.

In any event, we cannot see why you wish to change this agreement, as you are not using this track for the delivery of livestock."

After a lapse of time, Swift and Company sent a letter dated August 14, 1941, to the plaintiffs herein and the Nickel Plate, reading as follows:

"In order to avoid the possibility of excess charges which may accrue if the livestock shipped to Cleveland, Ohio, is delivered by your lines at the Cleveland Union Stock Yards, Swift and Company will immediately bill all its shipments of livestock for Cleveland for delivery at its plant in Cleveland and you are requested to see that such delivery is made."

On September 27, 1941, plaintiffs herein and the Nickel Plate wrote a letter to Swift and Company which, among other things, stated:

"As you know, the railroads cannot make delivery of livestock at your plant without traversing a track owned by The Cleveland Union Stock Yards Company. We shall be glad to comply with your request when, as and if we are advised by you that you have obtained the consent of the owner of this track for the use thereof without obligation to the railroads, for the delivery of livestock shipments to your plant. You will appreciate that until

this consent is obtained by you, we will be unable to comply with your request."

The complaint upon which the Commission's order is based was then filed by Swift and Company against the plaintiffs herein, the Nickel Plate, the Stock Yards, and The Livestock Terminal Service Company.

(8) The Commission held hearings on said complaint at
24 Cleveland, Ohio, April 22, 1942; a proposed order was issued by Examiner Carter in April 1943, recommending the dismissal of the complaint. Swift and Company requested oral argument, which was granted by the Commission, and oral argument was had before the entire Commission on June 4, 1943. By order of the Commission (on its own motion) of June 14, 1943, the case was reopened for further hearing and was heard at Cleveland, Ohio, on June 22, 1944. Further briefs were filed by all parties in October 1944.

In May 1945, a proposed report was issued by the Examiners, again proposing the dismissal of the complaint. Exceptions to this report were filed by Swift and Company on August 1, 1945. The case was again argued before the entire Commission on October 3, 1945, and the report and order of the Commission which is sought to be set aside and annulled in this action was rendered on May 3, 1946.

VII

As will be seen by an examination of said report and order of the Commission dated May 3, 1946, the plaintiffs herein, The New York, Chicago and St. Louis Railroad Company, The Cleveland Union Stock Yards Company and The Livestock Terminal Service Company (which latter named company has not been in existence since about October 1944) were notified and required.

(a) to cease and desist from refusing to deliver to the sidetrack of Swift and Company in Cleveland, Ohio, Swift and Company's interstate shipments of livestock consigned to said track and carried over the railroads of the plaintiffs herein and the Nickel Plate, and

(b) to establish and put in force, on or before the 30th day of November 1946, upon not less than 15 days' notice to the Commission and to the general public, as provided in Section
25 I (6) of the Interstate Commerce Act, and maintain in force thereafter a schedule or schedules providing for the delivery to the sidetrack of Swift and Company in Cleveland of its interstate shipments of livestock consigned thereto and carried over the railroads of the plaintiffs herein and the Nickel Plate.

VIII

As set forth more in detail hereinafter:

(a) The Report and Order of the Commission contain findings and requirements which transcend the constitutional and statutory powers of the Commission, and also misinterpretations and misapplications of the law, which would subject plaintiffs herein to irreparable damages and penalties.

(b) The Report and Order of the Commission contain findings which plaintiffs herein aver are not supported by any substantial evidence in the record, nor is there any rational basis to support certain conclusions, and for such reasons, are totally insufficient to support the ultimate findings and conclusions of the Commission and the order based thereon.

(c) In reaching the conclusions stated in the Report, the Commission has totally disregarded the evidence offered by the defendants (plaintiffs herein) and has arbitrarily and capriciously based its findings upon arguments and assertions made by complainants in the proceedings before the Commission, unsupported by any substantial evidence as will be shown hereinafter.

(d) In reaching its conclusions and in making its findings the Commission acted arbitrarily and unreasonably respecting important facts established by defendants (plaintiffs herein), and as respects certain fundamental principles of law, as set forth hereinafter.

26 (1) The Report and Order of the Commission is void and of no effect because of the impossibility of carrying it into effect. It would require the plaintiffs herein to commit an act of unlawful trespass upon the property of others, and thereby subject plaintiffs herein to further litigation and irreparable damages; and requires an impossible performance by plaintiffs herein, for the failure of which performance plaintiffs herein, their officers, representatives or agents, would be subjected to heavy and irretrievable penalties under Section 16 (8) of the Interstate Commerce Act, 49 U. S. Code Anno., Paragraph 16 (8).

(a) plaintiffs herein are ordered to publish, and maintain in force thereafter, tariffs providing for the rendering of service over lands and 1,619 feet of track which are not owned or controlled by any of the plaintiffs herein, but which lands and 1,619 feet of track are owned and controlled by the Stock Yards and can be used by plaintiffs herein only to the extent, and upon such terms only as, the owner of said property, i. e., the Stock Yards, will permit, and

(b) thereafter to perform the service of delivering carload interstate shipments of livestock to Swift and Company's plant sidetrack, which would necessitate moving said shipments over

and trespassing upon the said land and 1,619 feet of track owned and controlled by the Stock Yards, in order to comply with the requirements of the Commission in said Report and Order, and which said land and 1,619 feet of track owned and controlled by the Stock Yards cannot be used for the purpose required in the Order because of the fact that the terms of the sidetrack agreement now in force and effect between the New York Central and the Stock Yards, pertaining to the use by the New York Central of said land and 1,619 feet of track owned by the Stock Yards, prohibits such use of said land and track unless a charge for such use is paid to the Stock Yards. The order of the Commis-
27 sion would require the plaintiffs herein to exercise a greater right in the said land and 1,619 feet of track owned and controlled by the Stock Yards, than they in law and fact possess.

(c) None of the plaintiffs herein are vested with power to compel the Stock Yards to extend the use of its solely owned land and 1,619 feet of track to the New York Central to make possible the delivery of carload interstate shipments of livestock to Swift and Company's plant sidetrack, as is required by the order of the Commission, except possibly by means of land appropriation proceedings in a State court which, if successful, would cause irreparable, unwarranted and extensive damages to accrue to the plaintiffs herein, especially in view of the fact that the Stock Yards claims, among other things, that said 1,619 feet of track occupies its valuable street frontage land, and the use thereof must be preserved for such purposes as will serve its own best interests.

(d) The New York Central has received from the Stock Yards a notice in writing dated November 15, 1946, marked Exhibit E, attached hereto, terminating the use of the 1,619 feet of track and land occupied thereby, effective May 15, 1947, under the terms of the existing sidetrack agreement between the Stock Yards and the New York Central. The Stock Yards remains adamant in its refusal to permit the use of its 1,619 feet of track for the movement thereover of shipments of livestock to Swift and Company or any other packers, except upon conditions which will reserve to it the right to continue extending the use of said land and track on the basis of a private easement, together with such provisions as will prevent said track acquiring a status of a publicly
28 dedicated spur, and such provisions as will protect the interests of the Stock Yards. The Stock Yards considers such traffic to be competitive with and detrimental to its own business.

(e) Irreparable damages to plaintiffs herein would result if they attempted to comply with the order and under the Interstate Commerce Act plaintiffs herein could be subjected to fines

and penalties if they fail to obey the Order. The Commission has transcended its constitutional and Statutory powers by ordering plaintiffs herein to trespass upon property of others and to render a service to Swift & Co. which is over and beyond the transportation obligation of plaintiffs herein.

(2) The Report and Order of the Commission are arbitrary and unreasonable in that they contain indefinite, uncertain, and ambiguous conclusions. They indicate that a majority of the Commission has, by implication, recognized that the 1,619 feet of track and the land occupied thereby, which is owned and controlled by the Stock Yards, has not become dedicated to public use; yet the Report and Order fail to give any factual recognition or legal effect whatever to this fact. The Commission seems to have characterized the status of the 1,619 feet of track and land occupied thereby as having been devoted (not dedicated) to a public use in such a way as to prohibit withdrawing it from such use, and to have disregarded what the plaintiffs herein recognize as a carefully guarded control which the Stock Yards, by written agreement with the New York Central, has retained over the use of the track and land and the right to terminate the use thereof.

(a) At page 65 (266 ICC), the Report and Order reads, in part, as follows:

"* * * By the contract, the Stock Yards is not withdrawing its track from public use but, on the contrary, is contracting for its continued use as a part of the railroad's common carrier spur No. 245. *Whatever may be the right of the Stock*
29 *Yards to altogether withdraw its track from public use*, it seems evident and we so conclude, that the attempted special exception as to livestock could not, and has not, changed the common carrier status of the New York Central's spur No. 245 but that the latter remains with respect to its said spur, as much subject to the Act and its provisions as it is with respect to any other part of its railroad or facilities whereby it performs terminal services at Cleveland or other places." [Italics ours.]

and on page 67 (266 I. C. C.) the Commission finds:

"* * * *Whatever may be the Stock Yards' right to altogether withdraw its track from public use, in our opinion it may not, so long as contracting for its continued public use;* exact compensation on any such basis. *In any event, here we must look to the present contract and act on the existing practices. We cannot conjecture as to the future arrangements further than to assume that they will be lawful. Under the present contract,* the New York Contral is obligated to maintain track 1619 in good condition and repair but it seems manifest, and we so conclude, that, by resuming its duty to make deliveries of livestock over its spur, it will not incur lawful obligation to pay yardage charges

assessed as a penalty if it performs such a duty." [Italics ours.] The foregoing italicized qualifications apparently warrant the following comment in the dissenting opinion of Commissioner Splawn on page 77 (266 ICC):

"There is an inference in the majority report, twice mentioned, that the Stock Yards Company may have the right to withdraw altogether its track from public use."

The foregoing inference is also consistent with the recognition which the Commission gives to the right of the Stock Yards Company and New York Central to contract with respect to the use of the Stock Yards' track within the limitations expressed by the Commission's decision and the failure of the Commission to adopt the position taken by Swift and Company that this track had become dedicated to a public use and could not be withdrawn from public service.

Many arbitrary, uncertain and ambiguous observations
30 and conclusions in the decision are indicative of the uncertainty and doubt which must have existed in the minds of the Commission with respect to what relief, if any, could be granted complainant by the Commission.

(b) On the bottom of page 57 (266 ICC), the Commission holds

Portions of the spur from the main line to complainant's siding were dedicated to public use by various easements conveyed to the railroads by the Stock Yards, complainants, and others."

but there is no consideration given by the Commission to the terms of the easements and the various agreements; nor does the Report indicate what portions of the track there under discussion were dedicated to public use.

The Commission fails to consider the terms of the easements, one in particular referring to Sublot No. 166, situated just easterly of West 65th Street and in which the fee is owned by the Stock Yards. Swift and Company procured the easement over this sublot from the Stock Yards in 1910 in order to accomplish the construction of a track to its plant. One of the reservations in this easement reads:

"It is understood that in the event a connection between the Prim Street (now West 63rd Street) track and the main tracks of said Railway Company is made, at or near Clark Avenue, said Grantor (Stock Yards Company) reserves the privilege of having the connection switch between the Prim Street track and the Stock Yards track removed."

31 (c) Again, on page 69 (266 ICC), the report reads as follows:

"The only reason advanced for the failure to perform such service is the question as to the New York Central's right to use its spur for the delivery of livestock because of its contract with

the Stock Yards respecting the use of track 1,619. We have found, however, that such contract has not altered the common carrier status of the spur or the railroads' duties with respect thereto under the provisions of the Act. Accordingly, based on the above facts, circumstances and considerations, we find and conclude the defendants' failure in connection with the transportation of carload shipments of livestock consigned to complainant's plant, to accord delivery thereof directly to the latter sidetrack, is an unreasonable and unlawful practice in violation of Section 1 (6) of the Act.

Furthermore, Section 1 (9) of the Act, earlier outlined, which empowers us to require the railroads to construct, maintain and operate switch connections with private sidetracks constructed to connect therewith, shows clearly the intent and purpose of the law to clothe us fully and specifically with authority over the matter of the railroads' service in making delivery and taking receipt of freight directly to and from the sidetracks of shippers."

The Report and Order are arbitrary, ambiguous and contradictory in acknowledging that the Stock Yards may withdraw its 1,619 feet of track from use altogether but cannot lawfully limit its use—a proposition which is obviously contrary to the concepts of the law of property.

(d) No provision is found in the term "railroad" contained in Section 1 (3) (a) of the Interstate Commerce Act to the effect that private property used by one carrier under contract for limited purposes thereby becomes a railroad for unlimited use without agreement, condemnation or dedication. The Commission fails to apply this rational construction of the law.

(3) The Report and Order of the Commission are arbitrary and unreasonable in utterly disregarding the practices and rules promulgated by the Interstate Commerce Commission in connection wi[illegible] Parte 104, Part II, Terminal Services,
32 which prac[illegible]es and ru[illegible]s pertaining to the placing and spotting of cars on sidetracks were upheld by the United States Supreme Court in United States of America and Interstate Commerce Commission vs. American Sheet and Tin Plate Company, et al., 301 U. S. 402, 412, decided October 11, 1937. The Report and Order of the Commission are arbitrary and lack a rational basis in that they would require an absolute violation by the plaintiffs herein of Ex Parte 104, Part II, in connection with services required therein to be rendered to Swift and Co. The findings and order of the Commission in Ex Parte 104 (209 I. C. C. at page 45) referred to above read substantially as follows:

"When a carrier is prevented at its ordinary operating convenience from reaching points of loading or unloading within a

plant, without interruption or interference by the desires of an industry or the disabilities of its plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances, as set forth more specifically in rules 8, 9, and 10 of the appendix, the service beyond the point of interruption or interference is in excess of that performed in simple switching or team-track delivery. Payment for, or assumption by the carrier, of the cost of service performed beyond such points of interruption or interference is found to be unlawful in violation of Section 6 of the act.

"Generally the payments of allowances for service, or the performance of such service without charge, to points within a plant which respondents are prevented, by the desires of an industry or the disabilities of its plant, from reaching, without interruption or interference by the conditions mentioned in the preceding paragraph, provides the means by which the industry enjoys a preferential service not accorded to shippers generally. Such payment or performance dissipates respondents' funds and revenues, is not in conformity with efficient or economical management as contemplated by the Interstate Commerce Act, and not in the public interest."

(a) The ownership and control by the Stock Yards of its land and 1,619 feet of track and the restrictions placed thereon
33 with reference to competitive business being moved over the same creates such interruption and interference in reaching Swift and Company's plant as is contemplated in Ex Parte 104.

(b) Said order of the Commission would require the plaintiffs herein to provide Swift and Company with such superior services and conveniences as would constitute undue preference and advantages which are not extended or required to be extended to shippers generally.

(4) The Report and Order of the Commission are arbitrary, unreasonable, and contain a misinterpretation of the law in that they hold that failure of the plaintiffs herein to accord delivery of interstate shipments of livestock to Swift and Company's plant by traversing the said 1,619 feet portion of track No. 245, which is owned and controlled by the Stock Yards, and over which carload shipments of livestock are not permitted by the Stock Yards to be transported, while plaintiffs herein accord such service in connection with like shipments consigned to the other three named packers, subjects Swift and Company to undue prejudice and unduly prefers the other three named packers; and that said practice of the plaintiffs herein is in violation of Section 3 (1) of the Interstate Commerce Act; that the circumstances and conditions of transportation to the Swift and Company plant and

said other three named packers are substantially the same, and that all said plants are engaged in the same general business, buying their livestock in the same markets and disposing of the same dressed products in the same consuming territory, and that active competition exists between said parties in purchasing the live animals and in selling the dressed products. This holding is unsupported by any law whatsoever and is inconsistent with and contrary to many other holdings of the Commission.

34 (a) Due to the fact that Swift and Company does not have its own private sidetrack constructed to the right of way and there connected with the railroad of the New York Central, the hereinbefore described 1,619 feet of said track No. 245, which is owned and controlled by, and located upon the property of, the Stock Yards, has to be traversed in order to reach the private sidetrack at said plant of Swift and Company. This condition alone creates circumstances which are dissimilar to and not in anywise parallel with the situation existing with respect to the Lake Erie Provision Company, Long Dressed Beef Company and Ohio Provision Company—the other three named packers designated in the Report and Order as receiving undue advantage and preference—because said other three named packers own their own individual and separate private sidetracks at other locations in the general vicinity of the Stock Yards, which three individual and separate private sidetracks are constructed to the right-of-way and connected directly with the railroad of the New York Central, which enables said other three named packers to be served without traversing any facilities which are not under the sole control of the railroad.

(b) The first principle of the Commission's many decisions with respect to Section 3 issues is that the circumstances and conditions applying to the compared situations must be substantially similar. They are not substantially similar in the cases discussed in the report and order because of the Stock Yards' control over its track, as pointed out in Commissioner Splawn's dissenting opinion. In the recital of facts on pages 59 and 68 (266 I. C. C.), the Report and Order of the Commission recognize this distinctive fact, for it recites that the defendant carriers are transporting shipments of livestock

"directly to the plants of complainant's competitors, The
35 Lake Erie Provision Company, Long Dressed Beef Company and Ohio Provision Company, whose private sidetracks are adjacent to the Stock Yards, *but are served without using tracks of the Stock Yards.* * * * The three plants are all located in the same general section of the New York Central's Cleveland yard as that in which complainant's plant is located."

The fact italicized above indicates a very substantial distinction between the situation of the three named packers and Swift and Company. If the Stock Yards Company exercises its implied right to close its track altogether, as it now has done, and as the Commission concluded it could do, the distinction becomes absolute and controlling.

(c) The Commission then proceeds to find on page 68 (266 I. C. C.), that undue prejudice against Swift and Company exists because

"* * * all plants are engaged in the same general business, buying their livestock in the same markets and disposing of the same dressed products in the same consuming territories; and that active competition exists between them in purchasing the live animals and in selling the dressed products. * * *"

The Commission has used as a basis for a finding of Section 3 violation in this controversy such general indistinctive factors as the existence of business competition among the packers involved and the proximity of these packers to the New York Central's Cleveland Yard, rather than to apply the requirement of substantially similar conditions, and fails to give consideration to such a salient factual condition as the Stock Yards' undisputed ownership and control of its 1,619 feet of track which is involved with respect to shipments of livestock consigned to Swift and Company's plant as compared to individual direct private track connections owned and maintained by the other three named packers.

36 (5) The Report and Order of the Commissioner are arbitrary and unreasonable in that they ignore the fact that through the relationship and dealings which existed for many years between Swift and Company and the Stock Yards, Swift and Company had full knowledge at all times of the carefully guarded control retained by Stock Yards of its 1,619 feet of track and the restricted use thereof, all of which creates, or should create, an estoppel to any attempt by the Commission to hold that this 1,619 feet of track owned by the Stock Yards can be categorized as a public spur, in which Swift and Company would virtually acquire a vested interest under the holding of the Commission.

(6) The Report and Order of the Commission are arbitrary and unreasonable in that they ignore entirely the uncontradicted early history, circumstances and practices, including the history of the relationship between Swift and Company and the Stock Yards, which gave rise to the present controversy, which omission presents a situation directly contrary to the position taken by the Commission in determining the issues in the Chicago Stock Yards case (Swift & Comany, et al. v. Alton Railroad Company, et al.,

238 I. C. C. 179), which was affirmed by the United States Supreme Court May 4, 1942, in Swift and Company v. United States, 316 U. S. 216, 86 L. Ed. 1391. The early history of the relationship between Swift and Company and the Stock Yards in the instant case is equally as important in this controversy as was the relationship between the packers and the Stock Yards enterprise at Chicago, which early history, circumstances and practices were considered by the Commission and the Supreme Court of the United States as being extremely important.

37 (7) The Report and Order of the Commission virtually create new rights for the future for Swift and Company rather than disposing of the controversy involved in the complaint under present contracts, existing conditions and practices, and the long history in connection therewith. The Commission has arbitrarily and capriciously based its said findings upon arguments and assertions made by complainant in the proceeding before the Commission, in erroneously assuming and concluding that Swift and Company is entitled to have delivery of carload shipments of livestock resumed now over the 1,619 feet of track owned by Stock Yards so as to enable Swift and Company to build and construct additional unloading chutes and facilities which have not been in existence in the past, and thus be able to unload at one time several carloads of livestock as contrasted with the practice in the past, when only one carload could be unloaded at one time. On page 59 (266 I. C. C.) the Report reads "on this siding only one car at a time can be spotted for unloading at the runway leading west through the plant about 150 feet to the 10 storage pens. * * * By constructing moveable platforms and placing them alongside the cars, several cars of livestock could be unloaded at one time." Yet the Commission, on page 67 (266 I. C. C.), among other things, concludes: "In any event, here we must look to the present contract and act on the existing practices."

(8) The Report and Order of the Commission contain assumptions of fact which are not supported by the record, and unjustifiably and inequitably penalize the New York Central for having obtained the best arrangement possible with the owner for the use of the 1,619 feet of track owned by the Stock Yards in making delivery of such commodities consigned to Swift and Company's plant.

38 (9) The Report and Order are based upon arbitrary assumptions of fact, to which have been applied misinterpretations of law and decisions. The Report and Order have failed to consider or have completely and unjustifiably ignored pertinent facts and court decisions, and have misinterpreted and misapplied laws which have resulted in reaching unwarranted conclusions of fact and law.

IX

Unless the relief prayed for herein, including the issuance of an interlocutory or temporary injunction, be granted to plaintiffs herein, they will suffer irreparable injury and damage for the reasons and in the manner stated in this complaint.

Wherefore, plaintiffs herein pray:

(a) that the Court, as soon as practicable after the filing of this complaint, shall call to its assistance in the hearing and determination thereof, two (2) other judges, of whom one shall be a Circuit Judge;

(b) that a temporary or interlocutory injunction be entered herein, restraining, enjoining, and suspending, until the further order of this Court, the operation, execution, effect, and enforcement of said Report and Order of the Commission;

(c) that after final hearing this Court adjudge, order and decree that said Report and Order of the Commission are, and at all times have been, beyond the lawful authority of the Commission and wholly void, and that said order be perpetually vacated, set aside, suspended, and annulled, and the enforcement thereof perpetually restrained and enjoined; and

(d) such other and further relief as equity and good conscience shall require be granted to the plaintiffs herein.

The Baltimore and Ohio Railroad Company, Baker, Hostetler and Patterson, by Dwight B. Buss, Its Attorneys, 1956 Union Commerce Building, Cleve-
39 land, Ohio; The Pennsylvania Railroad Company, Squire, Sanders & Dempsey, by Geo. H. P. Lacey, Its Attorneys, 1857 Union Commerce Building, Cleveland, Ohio; The Erie Railroad Company, by Willis T. Pierson, General Counsel, Midland Building, Cleveland, Ohio; The Wheeling and Lake Erie Railway Company, M. B. and H. H. Johnson, by John A. Duncan, Its Attorneys, 1669 Union Commerce Building, Cleveland 14, Ohio; The New York Central Railroad Company, by Robert R. Pierce, Chief Assistant General Attorney, 1324 West Third Street, Cleveland, Ohio.

[*Duly sworn to by Robert R. Pierce; jurat omitted in printing.*]

40 *Exhibit "A" to complaint*

24760

INTERSTATE COMMERCE COMMISSION

No. 28714

SWIFT & COMPANY

v.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

Submitted October 3, 1945. Decided May 3, 1946

1. The refusal of defendants to deliver to the sidetrack of complainant, at Cleveland, Ohio, livestock shipments consigned thereto, while contemporaneously providing such service to complainant's competitors, found to be unduly prejudicial and preferential in violation of section 3 (1), an unreasonable and unlawful practice in violation of section 1 (6) and in violation of section 1 (9) of part I of the Interstate Commerce Act, Order issued directing the correction of these violations.
2. Where complainant makes application in writing to a railroad for the operation of a switch connection, has tendered interstate traffic to such carrier and the carrier has refused to maintain or operate such connection for the transportation of livestock to complainant's plant, and the record shows operation over the track for a number of years for the transportation of livestock, and at present for the transportation of commodities other than livestock, and the connection is practicable and may be made with safety, as in this case, and will furnish reasonable compensation to the carrier with whose line the connection is made, and the carrier refuses to maintain and operate such connection, a discrimination against complainant and a violation of section 1 (9) is found to exist.
3. Carriers cannot make contracts which abrogate the provisions of the Interstate Commerce Act.
4. The record does not contain evidence authorizing an award of reparation.

Ross D. Rynder for complainant.

W. N. King, R. R. Pierce, Kemper A. Dobbins, D. P. Connell, John J. Fitzpatrick, Andrew P. Martin, Willis T. Pierson, Dwight B. Buss, G. H. P. Lacey, A. Z. Baker, M. S. Farmer, and C. R. Heinemann for defendants.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions were filed by complainant to the report proposed by the examiners, and the issues were argued orally. Our conclusions differ from those recommended by the examiners.

By complaint filed September 5, 1941, complainant corporation alleges that the refusal and failure of defendants to deliver interstate carload shipments of livestock to complainant's sidetrack facilities at its packing plant in Cleveland, Ohio, have subjected and will subject complainant to charges for the transpor-

41 tation of livestock which were, are, and will be unreasonable, unjustly discriminatory, unduly preferential of complainant's competitors at Cleveland, unduly preferential of commodities other than livestock, and unduly prejudicial to complainant. Violations of section 1 (3) (a), (5), (18), (19), (20), and of sections 2 (1), 3 (1), and 6 (7) of the Interstate Commerce Act are alleged. In its briefs complainant urges that the evidence also establishes violations of section 1 (4), (6), and (9) of the act. The complaint is broad enough for us to consider the case under those provisions of the act as well as others. To plead the law relied on is no more necessary in a proceeding before the Commission than it is in a judicial proceeding. Chicago, R. I. & P. Ry. v. United States, 274 U. S. 29.

Complainant seeks the establishment of tariff provisions under which it may have transported to its plant carload shipments of livestock at rates not in excess of the railroad defendants' line-haul rates to Cleveland, thus restoring on shipments over the lines of carriers other than the New York Central the services and deliveries which were authorized by tariffs prior to November 12, 1938, and over the New York Central the services and deliveries authorized by its present tariffs. Complainant also seeks reparation in such sum as it may have been or may be required to pay, in excess of the line-haul rates, in order to obtain delivery of livestock, since August 10, 1941, and pendente lite. Reference herein to The New York Central Railroad Company will include its predecessor, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (The New York Central Railroad Company, lessee); and reference to complainant will include its predecessors, Henry C. Thom, People's Packing Company, and People's Packing & Provision Company.

The Cleveland Union Stock Yards Company, hereinafter called the Stock Yards, is made a defendant, and is alleged to be partially responsible for the alleged violations of the act. The Stock Yards is a proper party defendant in this proceeding, as its interests are directly affected by the rates, regulations or practices under consideration within the meaning of section 2 of the Elkins Act, 49 U. S. C. A., sec. 42, shown in the footnote.[1]

Complainant's packing plant at Cleveland extends from West Sixty-third Street on the east to West Sixty-fifth Street on the

[1] "That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers."

west and is directly across Sixty-fifth Street from the stock-
42 yards. The mainline of the New York Central runs north-
east and southwest some distance north of complainant's plant and along the northern boundary of the stockyards. Leading south from the main line and just west of Sixty-fifth Street is spur track No. 245 of the New York Central. The initial 132 feet of this spur is owned and operated by the railroad. The spur then continues 1,619 feet south over tracks and land owned by the Stockyards but maintained and operated by the railroad, hereinafter called track 1619. Continuing south of track 1619 and connecting with it is another railroad owned section of the spur, about 793 feet along. This section forms a wye, then crosses Sixty-fifth Street and swings northeast to the west side of Sixty-third Street, thence north just west of that street to complainant's siding and the sidetracks of three other industries, including a packing plant operated by Koblenzer Brothers. Track 245 affords the only rail connection between these four industries and three others located west of Sixty-fifth Street, all south of the main line, and the railroads serving Cleveland. Complainant's private sidetrack is operated under an agreement with the New York Central.

The facts with respect to the construction of track 1619 are as follows: On May 10, 1899, the Stock Yards and the New York Central entered into an agreement for its construction. The Stock Yards did the grading, agreed not to authorize third parties to use the track without the railroad's consent, and became the owner thereof. The New York Central laid the track and maintained it at the Stock Yards' expense. The railroad was given the right to use the track, without cost, for business other than that of the Stock Yards, provided such use did not interfere with the business of the Stock Yards. The railroad reserved the right, after 60 days' notice in writing, to discontinue the use of the track and to remove the connections. The agreement of May 10, 1899, was superseded by another of June 16, 1924, confirming the Stock Yards' ownership of track 1619 and providing for the maintenance thereof by, and at the expense of, the railroad. The free use of that track by the railroad was stated to be in consideration of maintenance. That agreement provided for its termination by either party on 30 days' written notice, but did not provide specifically that railroad use of the track should not interfere with the Stock Yards' business. The New York Central keeps track 1619 in repair and controls and operates the locomotives and other rolling stock which pass over it. Portions of the spur from the main line to complainant's siding were dedicated to public use by various easements conveyed to the railroad by the Stock Yards, complainant, and others.

Effective February 1, 1935, after 30 days' notice in writing, the agreement of June 16, 1924, was amended to prohibit the free use of track 1619 for "competitive traffic," construed by the
43 parties to mean livestock, "a charge for which use shall be the subject of a separate agreement." The Stock Yards then demanded on livestock delivered over track 1619 to chutes of complainant and other specified parties the charges named in Stock Yards' tariff No. 5 applicable to livestock consigned through the stockyards direct to packers and not offered for sale, ranging from 5 cents per head on sheep to 20 cents per head on cattle, or from $6 to $9 per carload. On September 7, 1938, the Stock Yards' charge became $5 per deck. No agreement concerning such charges was reached between the railroad and the Stock Yards, and on November 12, 1938, the switching charge of the New York Central was made inapplicable to livestock. In the meantime defendants had discontinued deliveries of livestock to complainant's siding. The carriers considered the charges demanded by the Stock Yards prohibitive as compared with a reciprocal switching charge of $3.47 per car then maintained by the railroads. By letter of August 14, 1941, complainant demanded that the line-haul carriers deliver livestock to its siding, which demand was refused. Complainant has since billed its livestock to its siding, which instructions defendants have ignored. Delivery has been tendered and accepted under protest at the unloading pens in the stockyards.

Events leading to the construction of the tracks to complainants' plant were as follows:

Beginning September 14, 1907, complainant and certain other industries negotiated for a direct spur from the New York Central's main tracks at Sixty-third Street, thence south over Sixty-third Street and across private land of the Lake Erie Provision Company to complainant's plant. A city ordinance to cross Sixty-third Street was obtained on May 25, 1908, and in May 1909, the court condemned the private land, awarding $13,500 damages. This made the total estimated cost of the track about $24,500. The track was not built as the interested parties were unwilling to bear so great an expense. Had this track been built it would not have been necessary to use track 1619 to reach complainant's plant.

In March 1910, complainant negotiated for the construction of the existing connection with its plant, which, as previously shown, crosses Sixty-fifth Street. It obtained the necessary city ordinance on September 6, 1910. The right-of-way east of Sixty-fifth Street, excepting a small parcel obtained from the stockyards, was conveyed to the railroad by complainant. The New York Central thus used (1) its own spur track, (2) stockyards' track

1619, and (3) its own tracks, to reach complainant's siding. Portions of the railroad's own tracks were laid over its own right-of-way across West Sixty-fifth Street, and on land covered by easements from the stockyards, complainant, Theurer-Norton Provision Company, and others.

44 Under a sidetrack agreement dated October 27, 1910, between complainant and the New York Central, the railroad was to construct and maintain the plant track at its own expense, to own the track, and to use it for business other than that of complainant when such use would not interfere with complainant's business. Both parties retained the right to discontinue use of the track and to require its removal on 60 days' notice. On May 25, 1912, a similar agreement was executed as to an extension of complainant's sidetrack. The agreements of October 27, 1910, and May 25, 1912, were superseded by one dated November 25, 1916, providing for a further extension of complainant's siding at complainant's expense for construction and maintenance, to be owned by complainant. This agreement also contained 60-day termination clauses in favor of both parties. On April 2, 1938, an agreement covering a sidetrack of the Federal Packing Company immediately north of complainant's siding was assigned to complainant. That agreement also contained a 30-day mutual termination clause.

In the western side of its plant complainant has 10 covered holding pens, sufficient to hold from 5 to 8 double-deck carloads of livestock. Two of the pens are for animals suspected of disease or imperfections. The other 8 pens are used for stock intended for slaughter, which is driven directly across the street from the stockyards, and for stock unloaded from trucks just south of the plant or from cars on complainant's siding near the southeast corner of the plant. On this siding only 1 car at a time can be spotted for unloading at the runway leading west through the plant about 150 feet to the 10 storage pens. By constructing movable platforms and placing them alongside the cars, several cars of livestock could be unloaded at one time. Truck shipments are received at a different entrance but reach the same alleys and pens. Complainant has land available south of its plant for enlarging its unloading and storage facilities.

From 1910 to February 1, 1935, defendants transported all classes of freight, including livestock, to and from complainant's siding over track 1619, and since February 1, 1935, they have transported all freight, other than livestock, to and from such siding over said track. Defendants also transport carload shipments of livestock to the private sidetracks of complainant's competitors, The Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company whose tracks are adja-

cent to the stockyards but are served by defendants without using tracks belonging to the stockyards. This service is performed by the carriers at the line-haul rates to Cleveland, and the three competitive plants are all located in the same general section of the New York Central's Cleveland yard as that in which complainant's plant is located.

45 Prior to November 12, 1938, the tariffs of the defendant rail carriers provided for delivery of carload shipments of livestock to complainant's siding in Cleveland at the line-haul rates to that point regardless of whether the shipments moved in line-haul service over the New York Central direct to Cleveland or over the lines of other carriers to points of interchange there with the New York Central and thence in switching service by the latter carrier to complainant's siding. The interline or interchange movements were made under authority of a reciprocal switching tariff of the New York Central, which provided for a switching charge of $3.15 (later $3.47) per car for switching carload freight generally, including livestock, from points of interchange with other carriers in the Cleveland switching district to the siding of complainant as well as numerous other industrial sidings in Cleveland. The tariffs of the other carriers provided for absorption of the New York Central's switching charge when their revenues exceeded specified amounts. On November 12, 1938, the New York Central canceled its switching charge on livestock but continued it on all other freight. Since then there has been no specific tariff authority for movement of livestock to complainant's siding when shipped to Cleveland over lines other than the New York Central. No similar cancelation was made, however, as to rates on shipments of livestock billed to complainant's siding for movement in line-haul service over the New York Central to Cleveland. On such traffic the tariffs of that carrier provided, and still provide, for delivery to complainant's siding at the line-haul rates to Cleveland. Nevertheless, for some time prior to November 12, 1938, and continuously since then, defendants have refused to deliver any livestock to complainant's siding, whether moved to Cleveland in line-haul service by the New York Central or by other carriers. Instead they have delivered all livestock consigned by complainant to itself at Cleveland into the yards of the Stock Yards Company at that point, and have collected the Cleveland line-haul rates on all such shipments. On livestock so delivered 24 hours' free storage is allowed. The stock is driven from the unloading pens through the stockyards to an exit directly across the street from complainant's plant, thence across track 1619 and Sixty-fifth Street into the portion of complainant's plant where it is to be slaughtered. Movable gates, previously installed, confine the stock while crossing track 1619

and Sixty-fifth Street. Certain yardage charges are assessed against the stock for egress from the stockyards.

Prior to 1930, the Stock Yards made no charge for the use of its facilities on direct shipments,[2] and as delivery at the stockyards was then as satisfactory to complainant as delivery on its own siding it billed little, if any, livestock to that siding,
46 although tariffs in effect when the siding was constructed and thereafter had authorized such delivery. About 1930, the Stock Yards attempted to charge packers for delivery on direct shipments through the yards, and between January 1, 1930, and February 1, 1935, complainant had 1,161 carloads delivered at its siding on which it paid the line-haul rates to Cleveland. Apparently such deliveries ceased after the latter date. During the same period, complainant also received 2,260 carloads through the stockyards. During a short period in 1934, the Stock Yards collected from the packers certain yardage charges; but, when the packers objected and threatened to divert shipments from the stockyards, the effort to collect such charges from them was abandoned. A charge of $4 per deck for delivery at the stockyards was paid and borne by the road-haul carriers to and including June 9, 1942. This included delivery to complainant.

Between 1916 and 1936, complainant owned stock in the stockyards. Its plant managers at Cleveland from November 2, 1916, to April 28, 1936, served as directors of the stockyards. From 1920 to 1924 the traffic manager of complainant, the stockyards, and the Cleveland Provision Company formed a traffic and transportation committee for the stockyards district. By order of the Supreme Court of the District of Columbia, dated January 31, 1931, complainant was required to divest itself of ownership in public stockyards which was accomplished at Cleveland February 8, 1936.

The duties of the railroads with respect to in-bound shipments of livestock to consignees at the Cleveland Stock Yards include the furnishing of suitable pens for unloading and the service of unloading from the cars into such pens. When those services are performed the carriers' duties are completed. The Secretary of Agriculture has asserted jurisdiction of charges on direct shipments to packers for services accorded by the Stock Yards beyond the unloading pens. For a complete discussion of this question, see Baltimore & O. R. Co. v. Cleveland Union Stock Yards Co., 255 I. C. C. 579, decided May 11, 1943. Since then complainant has been required to pay service charges to the Stock Yards in order to obtain possession of its direct shipments through

[2] Direct shipments of livestock are defined to mean livestock consigned directly to packers for slaughter, and not offered for sale in the public market.

the yards. As stated, the instant complaint seeking delivery at its siding was filed by complainant on September 5, 1941.

The New York Central excuses its failure to make the delivery to complainant's siding in Cleveland as called for in its lawfully filed and published tariffs, which delivery was requested by complainant from and after August 14, 1941, on the ground that to do so it would have to use track 1619 and pay to the Stock Yards Company charges of from $6 to $9 per car demanded by that concern for the use of that track. The New York Central considers these charges exorbitant. It therefore refuses to
47 pay them or to deliver livestock to complainant at its siding.

It is our opinion that carrier may not evade the provisions of its lawfully filed and published tariffs on such grounds. In our report in Guyton & Harrington Mule Co. v. Louisville & N. R. Co., 50 I. C. C. 546, 550, in respect of a somewhat similar situation at Nashville, Tenn., we found that the delivery of livestock, moving as defined in the Interstate Commerce Act, to complainant's siding in Nashville, at the line-haul rates to Nashville, was a privilege and facility shown in the lawfully filed and published tariffs of the delivering carrier, that the denial of the use of those facilities to complainant there was a rule, regulation, or practice in contravention of the carriers' tariff provisions which changed or affected the value of the service rendered to complainant as shipper and consignee, and that it was and will be unlawful for the delivering line to refuse to make deliveries of livestock to complainant's siding in Nashville.

The carrier's defense presents the question of whether a railroad, by entering into a contract with the Stock Yards Company aimed at compelling shippers making livestock shipments to Swift and the other industries beyond the track of the Stock Yards Company to use the facilities of the Stock Yards Co., can abrogate obligations placed upon it, in the public interest, by the Interstate Commerce Act. It is our opinion that it cannot, and that the relief sought by Swift should be granted.

Section 1 (1) of the Interstate Commerce Act declares: "The provisions of this part shall apply to common carriers engaged in (a) the transportation of passengers or property wholly by railroad * * *." Section 1 (3) (a) provides that the term railroad shall include "* * * all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation * * * of * * * persons or property * * * including all freight depots, yards or grounds used or necessary in the transportation or delivery of any such property." It defines the term "transportation" as includ-

ing "locomotives, cars, * * * and all instrumentalities and facilities of shipment or carriage irrespective of ownership, or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, * * * and handling of property transported."

Section 1 (4) provides that—"It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor." Section 1 (6) declares:

> It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce * * * just and reasonable regulations and practices affecting * * * the manner and method of * * * delivering property for transportation, the facilities for transportation, * * * and all other matters relating to or connected with the handling, transporting, storing, and delivery of property * * * which may be necessary or proper to secure the safe and prompt * * * handling, transportation, and delivery of property * * * upon just and reasonable terms, and every unjust and unreasonable * * * regulation and practice is prohibited and declared to be unlawful.

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Section 3 (1) provides that—

> It shall be unlawful for any common carrier subject to this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person * * * or any particular description of traffic, in any respect whatsoever; or to subject any particular person * * * or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever * * *.

Section 1 (9) provides—

> Any common carrier subject to the provisions of this Act, upon application of * * * any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any * * * private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper.

And it authorizes us upon complaint and hearing to enforce performance of that duty.

Section 15 (1) provides for the enforcement of these several provisions of the law.

These provisions of the law are complementary and clearly confer upon us the power and duty of regulating and controlling the practices of carriers affecting the transportation and delivery of property, and with respect to all the road, instrumentalities, and facilities used by them in performing such services.

Under agreements with the Stock Yards, the New York Central has for years used, and still is using, track 1619 as part of its railroad and terminal facilities at Cleveland. And the agreed use has been, and still is, not as a mere private track, or plant facility, of the Stock Yards, but as an essential link in, or part of, the New York Central's spur No. 245, by which the latter makes

delivery and takes receipt of freight in performing its common-carrier switching service to and from the plant of complainant and the several other plants and industries served by the spur. Obviously, the fact that the New York Central, acting in compliance with its private agreement with the Stock Yards, is at the present time refusing to transport particular traffic over its spur 29 does not alter the fact that the use it is making of the spur, including track 1619, is generally for all traffic offered and all industries reached and is not one confined to the serving of the Stock Yards or other particular plant. As stated by the Supreme Court in Union Lime Co. v. Chicago & N. W. Ry. Co., 233 U. S. 211, 221–222:

A spur may, at the outset, lead only to a single industry or establishment; it may be constructed to furnish an outlet for the products of a particular plant; its cost may be defrayed by those in special need of its service at the time. But none the less, by virtue of the conditions under which it is provided, the spur may constitute at all times a part of the transportation facilities of the carrier which are operated under the obligations of public service and are subject to the regulation of public authority. * * *

Track 1619 and the said railroad spur No. 245 which includes such track are located in the State of Ohio. In Morgan Run Ry. Co. v. Public Utilities Commission, 120 N. E. 295, the Supreme Court of Ohio had before it a situation closely analogous to that before us here. In that proceeding the owners of a certain coal mine reached by a common-carrier railroad serving them over a short intermediate track owned by a competing coal company, but operated by the railroad under an agreement with the owner, were being denied service because of objections from the owner of the intermediate section of track. The Public Utilities Commission of Ohio, which operates under a statute somewhat similar to the provisions of sections 1 and 3 of the Interstate Commerce Act, entered an order requiring the railroad to discontinue its unlawful practice and to resume service to the complaining mine. Upon appeal this order was sustained by the Supreme Court of Ohio in the above cited case. In its opinion the court said:

It is contended that the order of the commission requires the railway company to furnish facilities and operate a line on property now owned by it, that the commission has no jurisdiction to require one who is not a common carrier to act as such, and that the tracks which are located on the land of the coal and mining company are the private tracks of that company, over which the commission has no jurisdiction. Section 523, General Code, provides that the commission shall have the same control over private tracks, so far as such tracks are used by common carriers in connection with a railroad for the transportation of freight, as it has over tracks of such railroad. Section 8990, General Code, requires all railroad companies to extend to all persons receiving and shipping freight the same and equal opportunities. This statute is declaratory of the common law on the subject.

As we have shown the railway company is, as to so much of the line of railroad as is owned or operated by it, a common carrier; and any arrangement made by it for the transportation of freight over its road in connection with private tracks is subject to the jurisdiction of the commission.

The court therefore held that:

As long as the railway company operates any portion of the railway in question, it must do so without discrimination in favor of any shipper. This is a small and unimportant railroad, whose operations are very limited; but the questions that are brought to the court for consideration are not limited. They affect every common carrier. If this company may arbitrarily select those whom it will serve, any company may do so.

Here, as above pointed out, the agreed as well as actual use by the New York Central of the Stock Yards' track 1619 is not as a mere private track but is as an essential part of its spur No. 245. To say that the Stock Yards, while granting the use of its track 1619 generally for common-carrier service, may yet specify exceptions as to particular traffic which must be observed by the carrier, would be to assume that the Stock Yards and the New York Central could, by special provisions in their contract, change and nullify the laws under which the latter operates. By the contract, the Stock Yards is not withdrawing its track from public use but, on the contrary, is contracting for its continued use as part of the railroad's common-carrier spur No. 245. Whatever may be the right of the Stock Yards to altogether withdraw its track from public use, it seems evident and we so conclude, that the attempted special exception as to livestock could not, and has not, changed the common-carrier status of the New York Central's spur No. 245 but that the latter remains, with respect to its said spur, as much subject to the act and its provisions as it is with respect to any other part of its railroad or facilities whereby it performs terminal services at Cleveland or other places.

Before considering the provisions of the act involved in their application to the facts of record, it will be helpful to give further and more particular consideration to the terms of the Stock Yard's contract with the New York Central and their operation in effecting the exclusion of livestock from the traffic switched by the latter over its spur. Such contract does not expressly forbid the use of track 1619 for the carriage of livestock but rather singles it out as a special class of traffic for burdensome treatment. In terms, the contract simply prohibits the "free use" of the track for livestock and provides that a charge for the use thereof for livestock "shall be the subject of a separate agreement." But, after the making of the contract, the Stock Yards, in specifying the terms upon which it would agree to the use of the track for livestock, insisted that the railroad must pay, or assume, the yardage charges on livestock named in Stock Yards' tariff No. 5. The railroad refused to undertake such payments and, in lieu thereof, discontinued the switching of livestock over its spur to the siding of complainant, from which it resulted as stated above, that the latter had to accept delivery of the livestock on the premises of the Stock Yards subject to the payment of the yardage charges.

From the above, it is apparent that, while under the contract and terms of compensation subsequently demanded by the
51 Stock Yards, it was still open to the railroad to switch livestock over the spur embodying track 1619, the effect of the contract and such terms of compensation was to impose a penalty if it continued to do so. In fact, regardless of the amount of compensation specified by the Stock Yards for the use of its track for the carriage of livestock, the very singling out of livestock for the requirement of special compensation from the railroad shows that the provision is properly classed as a penalty provision, that is, one designed to secure yardage charges on livestock billed and moving to complainant's siding, either from complainant, or from the railroad engaged in hauling the traffic. The ground upon which the railroad discontinued the switching of livestock over the spur was that the compensation (consisting of the yardage charges) demanded by the Stock Yards for the incidental use of its track was exorbitant, but even if the compensation demanded had been but a fraction of that named, the railroad could, so far as the contract was concerned, have followed the same course and thus have avoided the payment of any compensation, or charge, specially set up against the use of the track for the carriage of livestock.

There has been some suggestion t' at, if we were to order the New York Central to resume the sw.tching of livestock over its spur No. 245, the result of such action would be to compel it to assume payment of the yardage charges named in Stock Yards Tariff No. 5, but we do not think that that is the case. In the first place, there is nothing in the present or previous contracts granting the use of track 1619 to the railroad which even suggests that the parties considered that, in addition to the railroad's assumption of the expense of track maintenance and other consideration for years regarded as entirely adequate, further compensation simply for such use was warranted. Apparently, it was the view of the railroad as well as the Stock Yards that the latter was within its rights as owner of the track to condition its contract for the use thereof in such way as to secure yardage charges on livestock even though billed directly to complainant's sidetrack and plant. But such yardage charges bear no relation whatever to the proper compensation payable simply for the use of the track by the railroad. They were demanded of the railroad, not for its use of the track in carrying traffic generally, but as charges specially assessed against the carriage of livestock. As said above, the provision singling out livestock for the requirement of special compensation was in fact a penalty provision, that is, a provision designed to secure yardage charges on livestock billed and moving to complainant's siding, either by stopping the movement and obtaining payment from complainant, or, if the railroad carried the

traffic through as provided in its tariffs and as bills, then as a penalty exacted from the railroad for observing its published
52 tariffs and other common-carrier duties under the Interstate Commerce Act and the Elkins Act.

It seems evident and, in any event, will be shown that the railroad could not lawfully single out and exclude livestock from the traffic transported over its common-carrier spur. It was, therefore, its duty to retain in its tariffs, as it did, the provision covering and including livestock. The fact that it ignored, and is ignoring, the tariff provision does not absolve it from the duty. The Stock Yards, we must assume, knew that it was dealing with a common carrier subject to regulatory laws. Whatever may be its right to retain the yardage charges collected from complainant in the past, if, pursuant to order entered by us, the railroad resumes the switching of livestock over its spur, it is our opinion that the Stock Yards could not lawfully collect, or the railroad pay, either yardage charges or any other amount of special compensation in effect demanded from the railroad as a penalty for observing its tariffs and other duties under the laws to which it is subjected.

The Stock Yards is, of course, entitled to reasonable compensation for the use of its track but this, we believe, does not mean compensation figured on the basis of what would be its stockyard earnings if the railroad's spur No. 245 was not open for the carriage and delivery of livestock to points beyond its yards. Whatever may be the Stock Yards' right to altogether withdraw its track from public use, in our opinion it may not, so long as contracting for its continued public use, exact compensation on any such basis. In any event, here we must look to the present contract and act on the existing practices. We cannot conjecture as to the future arrangements further than to assume that they will be lawful. Under the present contract the New York Central is obligated to maintain track 1619 in good condition and repair but it seems manifest, and we so conclude, that, by resuming its duty to make deliveries of livestock over its spur, it will not incur lawful obligation to pay yardage charges assessed as a penalty if it performs such duty.

For reasons above stated, we concluded that the contract between the New York Central and the Stock Yards had not changed the common-carrier status of the railroad's spur No. 245 but that the latter remained with respect to its said spur as much subject to the act and its provisions as it was with respect to any other part of its railroad or facilities whereby it performs terminal services at Cleveland or other places. Having in mind that, from the time of its first enactment, a principal aim of the act has been to "cut up by the roots every form of discrimination,

favoritism and inequality" (Louisville & N. R. Co. v. Mottley 219 U. S. 467, 478; O'Keefe v. United States, 240 U. S. 294,
53 297), consideration should perhaps be first given to the situation under section 3 which has resulted from the New York Central's refusal to handle livestock over its spur No. 245. While it results from such refusal that the complainant is denied any deliveries at its plant of carload shipments of livestock consigned to it but must, instead, in all cases accept delivery thereof on the premises of the Stock Yards subject to the payments of yardage charges, as above pointed out, the New York Central and other defendant carriers are at the same time continuing to transport like shipments of livestock directly to the plants of complainant's competitors, The Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company, whose private sidetracks are adjacent to the stockyards but are served without using tracks of the Stock Yards. This service is performed by the defendant carriers at the line-haul rates to Cleveland, and the three plants are all located in the same general section of the New York Central's Cleveland yard as that in which complainant's plant is located. The evidence shows, and we so find, that, with respect to the service, including the effecting of plant delivery, involved in transporting livestock to all of the plants, including that of complainant, the circumstances and conditions of transportation are substantially the same; that all plants are engaged in the same general business, buying their livestock in the same markets and disposing of the same dressed products in the same consuming territory; and that active competition exists between them in purchasing the live animals and in selling the dressed products. Accordingly, we conclude that the defendant carriers' failure, in connection with the transportation of carload shipments of livestock consigned to complainant's plant, to accord delivery thereof on the latter's sidetracks while according such service in connection with like shipments consigned to its competitors subjects complainant to undue prejudice and unduly prefers the competing plants above named.

The history of the New York Central's spur No. 245 has been outlined above. The complainant negotiated for its construction, conveyed to the railroad part of the land necessary for right-of-way, and obtained the necessary city ordinance for crossing Sixty-fifth Street. At about the same time, complainant's own plant track connecting with the spur was constructed under agreement with the railroad, and from time to time thereafter extensions of the track have been constructed under like agreements. The railroad assumed the expense of construction and maintenance, but was granted and is now exercising the right to use the track and extensions for business other than that of complainant. The

railroad's spur and complainant's sidetrack are available today, just as they have been for years, for the delivery of livestock directly to complainant's plant. For years all the defend-
64 ant railroads recognized that the performance of such service was included in the line-haul rates to Cleveland and, even today, the New York Central's tariffs provide for the service at such rates. The only reason advanced for the failure to perform such service is the question as to the New York Central's right to use its spur for the delivery of livestock because of its contract with the Stock Yards respecting the use of track 1619. We have found, however, that such contract has not altered the common-carrier status of the spur or the railroad's duties with respect thereto under the provisions of the act. Accordingly, based the above facts, circumstances, and considerations, we find a conclude that the defendants' failure, in connection with the transportation of carload shipments of livestock consigned to complainant's plant, to accord delivery thereof directly to the latter's sidetracks, is an unreasonable and unlawful practice in violation of section 1 (6) of the act.

Furthermore, section 1 (9) of the act, earlier outlined, which empowers us to require the railroads to construct, maintain, and operate switch connections with private sidetracks constructed to connect therewith, shows clearly the intent and purpose of the law to clothe us fully and specifically with authority over the matter of the railroads' service in making delivery and taking receipt of freight directly to and from the sidetracks of shippers.

The language of section 1 (9) has been interpreted by the Supreme Court in Interstate Commerce Commission v. Delaware L. & W. R. Co., 216 U. S. 531, 537, as having for its object "primarily, at least, to provide for shippers seeking an outlet either by a private road or a branch. * * *" And in United States v. B. & O. S. R. Co., 226 U. S. 14, 19, the Supreme Court stated that "the most obvious examples of such lines [lateral, branch lines] are those that are dependent upon and incident to the main line—feeders, such as may be built from mines or forests to bring coal, ore or lumber to the main line for shipment."

In the case of Cleveland C., C. & St. L. Ry. Co. v. United States, 275 U. S. 404, the Supreme Court held (page 408) that the authority conferred upon us by section 1 (9) of the act is not affected by the exemption of industrial, team, et cetera, tracks contained in section 1 (22); that paragraphs (18) to (21), inclusive, of section 1 do not cover sidetracks built by shippers, but section 1 (9) relates "to switch connections with private sidings built by the shipper" (page 408); that the authority to require one carrier to construct and operate a switch connection between its main line and the private sidetrack of an industry, conferred

upon this Commission by section 1 (9), is not confined to a case where the industry has no direct connection with the main line of any other carrier (pages 412–413), and that the word "shipper" as used in the paragraph is not confined to one who, at the time he makes application for the switch connection referred to in the paragraph, is a shipper over the line with which the switch connection is desired.

The word "shipper" as used in section 1 (9) is to be given a liberal construction, and includes one receiving traffic from the railroads as well as one offering such traffic for transportation. In either event, Swift comes within the definition as the record shows that the railroads deliver all other classes of freight to the Swift plant over the sidetrack in question, including coal, salt, lumber, et cetera, and move out-bound from the plant over the same track all out-bound shipments which are principally fresh meats and packing-house products. Hence, Swift is a shipper tendering interstate traffic for transportation. The next requirement is that where such a shipper makes such tender, a common carrier by railroad "shall construct, maintain and operate upon reasonable terms a switch connection with any * * * private sidetrack which may be constructed to connect with its railroad." The switch connection is actually built and in operation for all traffic other than livestock, and clearly is a part of the railroads' common-carrier facilities as defined in section 1 (3) (a). We can require its operation for livestock upon reasonable terms, provided the connection "is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same." The parties concede that the sidetrack and switch connection fully meet these quoted provisions of the law and that the only obstacle to their use for livestock is the contract discussed herein. We have said that track 1619 is now, and for years has been, devoted to a public use.

As already pointed out herein, it is the general practice of defendants to make industrial deliveries at points in the Cleveland switching district at the line-haul rates to Cleveland, and this practice would have been followed by them in respect of complainant's livestock, as it is now followed on all other carload traffic, were it not for the controversy with the stockyards over the use of track 1619. This is substantiated by the following excerpt from the oral argument of counsel for the New York Central on October 3, 1945:

> It does not make any difference to the New York Central whether this stock is placed at the stockyards' unloading pens or whether it is placed over at Swift & Company's plant. We stand ready to deliver it either place. But because of the barrier placed on this by the stockyards, the owner of the track, we are just not able to deliver over there.

Complainant points out that the New York Central is compelled to absorb unloading charges of $1.25 per single-deck car and $2.50 per double-deck car on all livestock delivered at the unloading pens of the stockyards, and that these charges would be avoided by making deliveries on complainant's siding.

56 In Baltimore Butchers Live Stock Co. v. P., B. & W. R. Co., 20 I. C. C. 124, decided February 13, 1911, we had before us for consideration a situation in respect of deliveries of livestock in Baltimore, Md., practically identical with that before us here. In that proceeding, complainant sought an order to compel the carriers to deliver livestock to its private siding, and to discontinue delivering same in the Union Stock Yards. The latter delivery had been made under a contract between the carrier and the Union Stock Yards designating the Stock Yards as the exclusive point for all livestock delivered in Baltimore. We found that the refusal of defendants to deliver to the sidetrack of complainant livestock consigned thereto was unreasonable and in violation of the law. At page 128 of our report therein, we said:

> Defendants receive the fertilizer and other products of the abbatoir on this track and deliver thereon the coal, hay, grain, and other articles needed by complainant. Moreover, they receive and deliver on this track for at least one other shipper. By long usage and in accordance with the custom of carriers generally, this track is regarded as the point of delivery and receipt of carload freight and we have heard no argument against the use of this track for livestock deliveries, except that this would be a violation of the contract which the carriers have made with the Union Stock Yards. • • • The railroads defendant may not make contracts which abrogate the act to regulate commerce; they may not refuse, because of their own contract, to furnish delivery that is reasonable upon tracks which they use as a terminal for these shippers; they may not discriminate as between commodities in the delivery which they give, where no reason exists for such discrimination excepting the presence of a contract made with a private corporation, as in this case. The amended act to regulate commerce provides that it is the "duty of all common carriers to establish, observe, and enforce just and reasonable regulations and practices affecting all matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property."

Similar observations are warranted upon the facts of record here. While the spur track in question there was owned entirely by the railroad, we do not consider this as having any legal significance in view of the operation and free maintenance of track 1619 here by the New York Central.

We find that the complainant has made application in writing to the carrier for operation of the switch connection discussed and has tendered interstate traffic to such carrier; that the New York Central has refused to maintain or operate such connection for the transportation of livestock to complainant's plant; that the facts shown above depicting operation over the track for a number of years for the transportation of livestock and since used for the transportation of commodities other than livestock shows that the

connection is practicable and may be made with safety and such refusal constitutes justification for the connection, and that the number of carloads of livestock which complainant is ready
57 and willing to have transported by railroad will furnish reasonable compensation to the carrier with whose line the connection is made, in this case the New York Central. We also find that the failure or refusal of the defendant, New York Central, to furnish cars for the movement of livestock traffic to complainant's plant at Cleveland, Ohio, while furnishing cars for the movement of other classes of traffic, constitutes a discrimination against Swift & Company within the meaning of this section. Consequently, we find that a violation of section 1 (9) of part I of the Interstate Commerce Act follows. This paragraph forbids discrimination against any shipper, resulting from a failure on the part of the carrier to comply with its requirements. The facts show such a violation against the complainant, resulting from defendant's failure to accept and transport its shipments of livestock over the connection under the circumstances discussed in this report.

An appropriate order will be entered.

BARNARD, Chairman, dissenting:

The majority finds the refusal of defendants to deliver to the sidetrack of complainant at Cleveland, Ohio, livestock shipments consigned thereto, while contemporaneously providing such service to complainant's competitors, to be an unreasonable and unlawful practice in violation of section 1 (6), to be in violation of section 1 (9), and to be unduly prejudicial and preferential in violation of section 3 (1) of part I of the Interstate Commerce Act.

In my opinion the majority's construction of the word "practices" in section 1 (6) of the act is in conflict with the construction placed thereon by the Supreme Court in United States v. Pennsylvania R. Co., 242 U. S. 208, 228. The Supreme Court, among other things, held that no power was given to this Commission to order a carrier to provide and furnish tank cars that it did not possess even though section 1 of the act defined the term "transportation" as including "cars * * * irrespective of ownership or of any contract" for the use thereof, and made it the duty of every common carrier "to furnish and provide such transportation upon reasonable request therefor." Following the reasoning of the Supreme Court, it is my view that the failure of the railroad to acquire the use of track 1619 to transport livestock to complainant's plant is not a practice within the meaning of section 1 (6).

Section 1 (9) provides:

Any common carrier subject to the provisions of this part, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate

traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its
58 railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section thirteen of this part, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this part, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission other than orders for the payment of money.

This proceeding does not concern the construction, maintenance, or operation by the New York Central of a switch connection between its track and the private sidetrack adjoining complainant's plant. Such a connection has been maintained and operated by the New York Central for many years under an agreement with complainant. The only question before the Commission in this proceeding relates to the use of 1,619 feet of track constructed in 1899 by the Cleveland Union Stock Yards Company, hereinafter referred to as the Stock Yards, on land owned by it.

Complainant's packing plant extends from West Sixty-third Street on the east to West Sixty-fifth Street on the west and is directly across Sixty-fifth Street from the stockyard. The main line of the New York Central runs northeast and southwest some distance north of complainant's plant and along the northern boundary of the stockyards. Leading south from the main line and just west of Sixty-fifth Street is a spur track of which the initial 132 feet is owned and operated by the railroad. This spur then continues 1,619 feet south over tracks and land owned by the Stock Yards but maintained and operated by the railroad, hereinafter called track 1619. Continuing south of track 1619 and connecting with it is another railroad-owned spur, about 793 feet long. This section forms a wye, then crosses Sixty-fifth Street and swings northeast to the west side of Sixty-third Street, thence north just west of that street to complainant's siding and the sidetracks of three other industries including a packing plant operated by Kohlenzer Brothers. This spur track affords the only rail connection between the railroads serving Cleveland and those four industries and three others located west of Sixty-fifth Street, all south of the main line.

On May 10, 1899, the Stock Yards and the New York Central entered into an agreement for the construction of track 1619. The

Stock Yards did the grading, agreed not to authorize third parties to use the track without the railroad's consent, and became
59 the owner thereof. The New York Central laid the track and maintained it at the Stock Yards' expense. The railroad was given the right to use the track, without cost, for business other than that of the Stock Yards, provided such use did not interfere with the business of the Stock Yards. The railroads reserved the right, after 60 days' notice in writing, to discontinue the use of the track and to remove the connections. The above-mentioned agreement was superseded by another of June 16, 1924, confirming the Stock Yards' ownership of track 1619 and providing for the maintenance thereof by, and at the expense of, the railroad. The free use of that track by the railroad was stated to be in consideration of maintenance. That agreement provided for its termination by either party on 30 days' written notice, but did not provide specifically that railroad use of the track should not interfere with the Stock Yards' business.

Effective February 1, 1935, after 30 days' notice in writing, the agreement of June 16, 1924, was amended to prohibit the free use of track 1619 for "competitive traffic," construed by the parties to mean livestock, "a charge for which use shall be the subject of a separate agreement." The Stock Yards then demanded on livestock delivered over track 1619 to chutes of complainant and other specified parties the charges named in Stock Yards tariff No. 5 applicable to livestock consigned through the Stock Yards direct to packers and not offered for sale, ranging from 5 cents per head on sheep to 20 cents per head on cattle, or from $6 to $9 per carload. On September 7, 1938, the Stock Yards' charge became $5 per deck. No agreement concerning such charges was reached between the railroad and the Stock Yards, and on November 12, 1938, the switching charge of the New York Central was made inapplicable to livestock. In the meantime, defendants had discontinued deliveries of livestock to complainant's siding. The carriers considered the charges demanded by the Stock Yards prohibitive as compared with a reciprocal switching charge of $3.47 per car then maintained by the railroads. By letter of August 14, 1941, complainant demanded that the line-haul carriers deliver livestock to its siding, which demand was refused. Complainant has since billed its livestock to its siding, which instructions defendants have ignored. Delivery has been tendered and accepted under protest at the unloading pens in the stockyards.

From September 6, 1910, until January 1, 1930, complainant received its livestock at the Stock Yards and drove the stock across the street for immediate slaughter. Between January 1, 1930, and February 1, 1935, the New York Central delivered 1,161 carloads of livestock on complainant's siding, on which the Cleve-

land line-haul rates were charged under appropriate tariff provisions. Even during that period, complainant also received 2,260 carloads through the stockyards. In 1934 when the volume reached substantial proportions, the Stock Yards took steps which in effect prohibited the use of track 1619 for the transportation of livestock to others. This action was taken because Swift had been using that track to divert a substantial part of the Stock Yards' business of providing holding pens and other facilities enabling complainant to drive its livestock within the yards to the exit immediately across the street from complainant's plant.

As stated, the railroad transports all classes of freight, except livestock, to and from Swift's siding over track 1619. These other commodities are not competitive with livestock; and unlike livestock, these other commodities are not competitive with the Stock Yards' business. Moreover, I do not believe that the alleged preference of commodities other than livestock is undue under section 3 (1) because complainant is clearly benefited by use of the track for switching its traffic other than livestock.

The railroad switches livestock to sidings of three of Swift's allegedly preferred competitors in Cleveland, but those competitors, unlike Swift, reach the New York Central directly, and do not require the use of track 1619 or any other private track of the Stock Yards, as does Swift. Those competitors are not being preferred through use of that track. In fact, the railroad is prohibited from using track 1619 for livestock. No such prohibition exists with respect to the transportation of livestock to the plants of the three alleged competitors. It would not benefit Swift if that track was altogether withdrawn from use. Owing to this substantial dissimilarity of facts, the alleged preference of Swift's competitors, in my opinion, is not undue within the meaning of section 3 (1) of the act.

The evidence does not disclose any well-established or long-continued custom of free use of track 1619 for livestock. There was no public dedication of track 1619 by easement—instead the Stock Yards specifically reserved the right to terminate the sidetrack agreement. The Stock Yards has carefully guarded its control over the use of that track. So far as livestock traffic is concerned track 1619 clearly is a private track. The Commission has no authority to require the railroad to exercise a greater right in the track than it in fact possesses. The condemnation of private tracks for public use is a matter for decision by the courts and not by this Commission.

To require the railroad to acquire either tracks or trackage rights to handle livestock over track 1619 would amount in effect to requiring an extension of the railroad contrary to sections 1

(18) to 1 (22) which specifically provide that the Commission's authority shall not extend to the construction or abandonment of spur, industrial, team, switching, or sidetracks located or
61 to be located wholly within one State. Section 1 (9) relates to switch connections only and not to the extension of trackage rights over sidetracks. Compare Cleveland, C., C. & St. L. Ry. Co. v. United States, 275 U. S. 404, at pages 408 and 409.

Beginning September 14, 1907, complainant and certain other industries negotiated for a direct spur from the New York Central's main tracks at Sixty-third Street, thence south over Sixty-third Street and across private land of the Lake Erie Provision Company to complainant's plant. A city ordinance to cross Sixty-third Street was obtained on May 25, 1908, and in May 1909 the court condemned the private land, awarding $13,500 damages. This made the total estimated cost of the track about $24,500. The track was not built as the interested parties were unwilling to bear so great an expense. If that project had been consummated the use of track 1619 would not have been necessary in order for the New York Central to reach complainant's siding.

In view of the fact that track 1619 is owned by a private industry, not a common carrier by railroad, the Stock Yards is clearly within its legal rights in restricting the use of that track in such manner as to prevent Swift from interfering with the business of the Stock Yards.

It therefore follows that that track being privately owned and not having been condemned by any condemnation proceeding, the sole right of determining the use thereof remains in the Stock Yards. There is no jurisdiction in the Commission to require the Stock Yards to permit the New York Central to use the track for any purpose unless such use is agreeable to the Stock Yards.

In my opinion, the complaint should be dimissed.

I am authorized to state that COMMISSIONER PATTERSON joins in this expression.

SPLAWN, Commissioner, dissenting:

I dissent from the finding that there is a violation of section 3, because, in my opinion, the circumstances and conditions surrounding the transportation of livestock to Swift's private siding are not substantially similar to those surrounding the transportation of livestock to the private sidings of Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company. The plants of the latter companies are outside of the stockyards and are served by defendants without using tracks owned by the Stock Yards. In order to reach Swift's siding, defendants must use track 1619, which is owned by the Stock Yards Company, and whose use by defendants for the transportation

of livestock has been prohibited. No such prohibition exists with respect to the transportation of livestock to the plants of the three companies above named. This difference in circumstances and conditions precludes a finding under section 3. Nor do
62 I believe that the preference that may be caused by the permission to use track 1619 for all traffic except livestock is undue because complainant is clearly benefited by use of the track for switching its traffic other than livestock.

The finding of a violation of section 1 (6) is apparently based upon the conclusion that the provision of the contract between the Stock Yards Company and the New York Central excepting livestock is a "penalty" provision which changes and nullifies the laws under which the New York Central operates and that, therefore, the provision is of no legal force and effect. I am unable to agree with the finding or with the conclusion upon which it is based. Track 1619 is owned by the Stock Yards Company and is constructed on its land within the stockyards property. It has not been dedicated to the public, and therefore its use may be restricted, in whole or in part, by its owner. There is an inference in the majority report, twice mentioned, that the Stock Yards Company may have the right to withdraw altogether its track from public use. If it has such authority over the track, it seems to me that it has the right to restrict its use.

While section 1 (9) provides that the carrier shall operate switch connections with private sidetracks which may be constructed to connect with its railroad, there is no express language in the section requiring the operation of the sidetrack in instances where such operation is prevented by conditions not imposed by the carrier and beyond its control. This report does not contain conclusions of fact and findings on which it is possible to give complainant relief under section 1 (9).

COMMISSIONER AITCHISON did not participate in the disposition of this proceeding.

63 *Exhibit "B-1" to Complaint*

INTERSTATE COMMERCE COMMISSION

WASHINGTON, D. C.

JULY 25, 1946.

IN THE MATTER OF LETTER REQUEST OF DEFENDANTS FOR POSTPONEMENT OF THE EFFECTIVE DATE OF THE ORDER

Present: Claude R. Porter, Commissioner, to whom the above entitled matter has been assigned for action thereon.

Upon further consideration of the record in the above entitled proceedings, and upon consideration of letter request of defend-

ants for postponement of the effective date of the order, and for good cause appearing:

It is ordered, that the order entered in said proceeding on May 3, 1946, which by its terms is made effective on or before August 30, 1946, upon not less than 30 days' notice, be, and it is hereby, modified to become effective on or before October 30, 1946, upon not less than 15 days' notice, instead of August 30, 1946.

(Sgd.) W. P. BARTEL,
Secretary, Interstate Commerce Commission.

64 *Exhibit "B-2" to Complaint*

INTERSTATE COMMERCE COMMISSION
WASHINGTON, D. C.

OCTOBER 17, 1946.

IN THE MATTER OF TELEGRAPHIC REQUEST OF DEFENDANTS FOR POSTPONEMENT OF THE EFFECTIVE DATE OF THE ORDER

Present: Charles D. Mahaffie, Commissioner, to whom the above entitled matter has been assigned for action thereon.

Upon further consideration of the record in the above-entitled proceedings, and upon consideration of telegraphic request of defendants for postponement of the effective date of the order, and for good cause appearing:

It is ordered, that the order entered in said proceeding on May 3, 1946, which was subsequently modified to become effective October 30, 1946, upon not less than 15 days' notice, be, and it is hereby, further modified to become effective November 30, 1946, upon like notice, instead of October 30, 1946.

(Sgd.) W. P. BARTEL,
Secretary, Interstate Commerce Commission.

65 *Exhibit "B-3" to Complaint*

INTERSTATE COMMERCE COMMISSION
WASHINGTON, D. C.

NOVEMBER 13, 1946.

IN THE MATTER OF TELEGRAPHIC REQUEST BY DEFENDANTS FOR SHORTENING OF THE NOTICE REQUIRED BY THE ORDER

Present: Charles D. Mahaffie, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

Upon further consideration of the record in the above-entitled proceedings, and upon consideration of the telegraphic request

by defendants for shortening of the notice required by the order, and for good cause appearing:

It is ordered, that the order entered in said proceeding on May 3, 1946, which was subsequently modified to become effective November 30, 1946, upon not less than 15 days' notice, be, and it is hereby, further modified to become effective November 30, 1946, upon not less than 5 days' notice instead of 15 days' notice.

(Sgd.) W. P. Bartel,
Secretary, Interstate Commerce Commission.

67 *Exhibit "D" to Complaint*

Dated Cleveland, Ohio, Dec. 20, 1943

Supplemental Agreement to Sidetrack Agreement Dated June 16, 1924, Between the New York Central Railroad Company, Successor to and Lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and the Cleveland Union Stock Yards Company

Whereas, on May 29, 1943, The Cleveland Union Stock Yards Company, called the Industry herein and in the agreement dated June 16, 1924, gave notice in writing to The New York Central Railroad Company Successor to and Lessee of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, called the Railroad herein and in said agreement of June 16, 1924, under Section Sixth of said agreement, that said agreement would be terminated thirty (30) days thereafter, however, that all provisions of said agreement of June 16, 1924, as amended February 1, 1935, except Section Fourth thereof may be continued in full force and effect, provided that the Railroad would pay to the Industry rental for the occupancy of the Industry's land by any and all tracks located thereon belonging to the Railroad and for the restricted use of any and all tracks belonging to the Industry and located on its land, provided all of said tracks were maintained by the Railroad.

Now, therefore, for and in consideration of the mutual promises and covenants in said agreement dated June 16, 1924, and hereinafter set forth, the parties hereto agree as follows:

First: All provisions, except Sections Fourth and Sixth in said agreement of June 16, 1924 and Section Fourth as amended February 1, 1935, shall continue in full force and effect.

Second: Said Section Fourth in said agreement of June 16, 1924, as amended February 1, 1935, shall be and is hereby changed and modified, effective as of July 1, 1943, to read as follows:

"Fourth. The Railroad shall maintain all of said tracks, irre-